

# THE GENERAL STATUTES OF NORTH CAROLINA

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## 1971 SUPPLEMENT

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Completely Annotated, under the Supervision of the Department  
of Justice, by the Editorial Staff of the Publishers

UNDER THE DIRECTION OF  
W. M. WILLSON, J. P. MUNGER, SYLVIA FAULKNER AND  
H. A. FINNEGAN, JR.

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## Volume 1A

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## Preface

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This Supplement to Replacement Volume 1A contains the general laws of a permanent nature enacted at the 1971 Session of the General Assembly which are within the scope of such volume, and brings to date the annotations included therein.

Amendments of former laws are inserted under the same section numbers appearing in the General Statutes, and new laws appear under the proper chapter headings. Editors' notes point out many of the changes effected by the amendatory acts.

Chapter analyses show new sections and also old sections with changed captions. An index to all statutes codified herein appears in Replacement Volumes 4B, 4C and 4D.

A majority of the Session Laws are made effective upon ratification but a few provide for stated effective dates. If the Session Law makes no provision for an effective date, the law becomes effective under G.S. 120-20 "from and after thirty days after the adjournment of the session" in which passed. All legislation appearing herein became effective upon ratification, unless noted to the contrary in an editor's note or an effective date note.

Beginning with the opinions issued by the North Carolina Attorney General on July 1, 1969, any opinion which construes a specific statute will be cited as an annotation to that statute. For a copy of an opinion or of its headnotes write the Attorney General, P.O. Box 629, Raleigh, N.C. 27602.

The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes or in this Supplement and any suggestions they may have for improving the General Statutes, to the Department of Justice of the State of North Carolina, or to The Michie Company, Law Publishers, Charlottesville, Virginia.





# Scope of Volume

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## Statutes:

Permanent portions of the general laws enacted at the 1971 Session of the General Assembly affecting Chapters 1 through 1B of the General Statutes.

## Annotations:

### Sources of the annotations:

- North Carolina Reports volumes 275 (p. 342)-279 (p. 191).
- North Carolina Court of Appeals Reports volumes 5 (p. 228)-11 (p. 596).
- Federal Reporter 2nd Series volumes 410 (p. 449)-443 (p. 1216).
- Federal Supplement volumes 298 (p. 1201)-328 (p. 224).
- United States Reports volumes 394 (p. 576)-403 (p. 442).
- Supreme Court Reporter volumes 89 (p. 2152)-91 (p. 1976).
- North Carolina Law Review volumes 47 (p. 732)-49 (p. 591).
- Wake Forest Intramural Law Review volume 6 (p. 568).
- Opinions of the Attorney General.



# The General Statutes of North Carolina 1971 Supplement

## VOLUME 1A

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## SUBCHAPTER I. DEFINITIONS AND GENERAL PROVISIONS.

## ARTICLE 1.

*Definitions.*

## § 1-1. Remedies.

**References to Superior Court Deemed to Refer Also to District Court.**—Following the provisions of § 7A-193, the references in Chapter 1 of the General Statutes to the

superior court are deemed to refer also to the district court. *Boston v. Freeman*, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

**§ 1-7. When court means clerk.**—In the following sections which confer jurisdiction or power, or impose duties, where the words “superior court,” or “court,” in reference to a superior court are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular session of the court, in which cases the judge of the court alone is meant. (C. C. P., s. 9; Code, s. 132; Rev., s. 352; C. S., s. 397; 1971, c. 381, s. 12.)

**Editor's Note.**—The 1971 amendment, effective Oct. 1, 1971, substituted “session” for “term.”

## ARTICLE 2.

*General Provisions.*

## § 1-11. How party may appear.

**Editor's Note.**—For note on the right to defend pro se, see 48 N.C.L. Rev. 678 (1970).

**§ 1-13. Jurisdiction of clerk.**—The clerk of the superior court has jurisdiction to hear and decide all questions of practice and procedure and all other matters over which jurisdiction is given to the superior court, unless the judge of the court or the court at a regular session is expressly referred to. (C. C. P., s. 108; Code, s. 251; Rev., s. 358; C. S., s. 403; 1971, c. 381, s. 12.)

**Editor's Note.**—

The 1971 amendment, effective Oct. 1, 1971, substituted “session” for “term.”

## SUBCHAPTER II. LIMITATIONS.

## ARTICLE 3.

*Limitations, General Provisions.*

**§ 1-15. Statute runs from accrual of action.**—(a) Civil actions can only be commenced within the periods prescribed in this Chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute.

(b) Except where otherwise provided by statute, a cause of action, other than one for wrongful death, having as an essential element bodily injury to the person or a defect in or damage to property which originated under circumstances making the injury, defect or damage not readily apparent to the claimant at the time of its origin, is deemed to have accrued at the time the injury was discovered by the claimant, or ought reasonably to have been discovered by him, whichever event first occurs; provided that in such cases the period shall not exceed 10



years from the last act of the defendant giving rise to the claim for relief. (C. C. P., s. 17; Code, s. 138; Rev., s. 360; C. S., s. 405; 1967, ch. 954, s. 3; 1971, c. 1157, s. 1.)

**Editor's Note.—**

The 1971 amendment redesignated the former section as subsection (a), and added subsection (b).

Session Laws 1971, c. 1157, s. 2, provides: "This act shall become effective upon ratification and shall not affect pending litigation."

For note on when a cause of action accrues for limitations purposes in medical malpractice—the discovery rule, see 6 Wake Forest Intra. L. Rev. 532 (1970).

**The purpose of a statute of limitations** is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**Statutes of limitations are inflexible and unyielding.** They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**The court has no discretion when considering whether a claim is barred** by the statute of limitations. A judge may not, in his discretion, interfere with the vested rights of a party where pleadings are con-

cerned. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**Right of Defendant to Rely on Statute as a Defense.**—The statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**Burden of Proof on Plaintiff When Statute Pleaded.** — The statute of limitations having been pleaded, the burden is on the plaintiff to show that his cause of action against the defendant accrued within three years prior to the institution of the suit. *State v. Cessna Aircraft Corp.*, 9 N.C. App. 557, 176 S.E.2d 796 (1970).

**A suit does not involve an "injury to the person or rights of another" until plaintiff is hurt.** *Stell v. Firestone Tire & Rubber Co.*, 306 F. Supp. 17 (W.D.N.C. 1969).

**Action for Injuries Resulting from Accident Caused by Defective Tire.**—Where plaintiff brought action for injuries suffered in an accident allegedly caused by failure of a tire, it was held that there was no "injury" and no basis for action and the statute did not begin to run until the wreck occurred. *Stell v. Firestone Tire & Rubber Co.*, 306 F. Supp. 17 (W.D.N.C. 1969). See new subsection (b) of this section, added by the 1971 amendment.

**§ 1-17. Disabilities.**—A person entitled to commence an action, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, who is at the time the cause of action accrued either—

- (1) Within the age of 18 years; or
- (2) Insane; or
- (3) Imprisoned on a criminal charge, or in execution under sentence for a criminal offense;

may bring his action within the times herein limited, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the same, when he must commence his action, or make his entry, within three years next after the removal of the disability, and at no time thereafter. (C. C. P., ss. 27, 142; Code, ss. 148, 163; 1899, c. 78; Rev., s. 362; C. S., s. 407; 1971, c. 1231, s. 1.)

**Cross Reference.**—As to effect of lowering age of majority from 21 to 18 upon applicability of statute of limitations tolled for infancy, see § 48A-3.

**Editor's Note.—**

The 1971 amendment substituted "18" for "twenty-one" in subdivision (1).

For article "Transferring North Carolina

Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

**Cited in** *Hanes Dye & Finishing Co. v. Caisson Corp.*, 309 F. Supp. 237 (M.D.N.C. 1970); *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

## § 1-21. Defendant out of State: when action begun or judgment enforced.

### Editor's Note.—

For note on choice of law rules in North Carolina, see 48 N.C.L. Rev. 243 (1970).

## § 1-26. New promise must be in writing.

### II. ACKNOWLEDGMENT OR NEW PROMISE.

**Action Based on Failure of Equipment to Conform to Original Warranty.**—The statute providing that a new promise must be in writing and signed by the party to be charged in order to start the running of the

statute of limitations, is inapplicable where the plaintiff's action was based upon the failure of the equipment to conform with the original warranty and not upon any new promise by the seller. *Styron v. Loman-Garrett Supply Co.*, 6 N.C. App. 675, 171 S.E.2d 41 (1969).

## ARTICLE 4.

### *Limitations, Real Property.*

## § 1-36. Title presumed out of State.

This section makes it unnecessary to prove the sovereign has parted with its title when not a party to the action. *King v. Lee*, 9 N.C. App. 369, 176 S.E.2d 394 (1970).

**When Title Out of State Presumed.**—In a condemnation proceeding, where the question of ownership was essentially an

action between individual litigants, and the State, although a party for purposes of condemnation, claimed title only by virtue of the condemnation and not otherwise, the presumption is that title is out of the State. *State v. Johnson*, 278 N.C. 126, 179 S.E.2d 371 (1971).

## § 1-38. Seven years possession under color of title.

### I. GENERAL NOTE ON ADVERSE POSSESSION.

#### A. General Consideration.

##### Editor's Note.—

For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

##### Definition.—

In accord with 1st paragraph in original. See *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969); *Wilson County Bd. of Educ. v. Lamm*, 276 N.C. 487, 173 S.E.2d 281 (1970).

##### Effect of Holding Portion of Land, etc.—

When one enters upon a tract of land and asserts his ownership of the whole under an instrument which constitutes color of title, the law will extend his occupation of a portion thereof to the outer bounds of his deed—provided no part of the premises is held adversely by another. His exclusive possession, if continued uninterruptedly for seven years, will ripen title to all the land embraced within the deed. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

**Where the title deeds of two rival claimants lap, etc.—**

In accord with 1st paragraph in original.

See *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

When a portion of a boundary of a junior grant laps on a superior title to mature a title under the junior grant, there must be shown adverse and exclusive possession of the lappage, or the law will presume possession to be in the true owner as to all that portion of the lappage not actually occupied by the junior claimant. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

When a junior grant incorporates a portion of a senior grant it is not necessary for the junior grantee claiming title by seven years' adverse possession under color to show that the boundaries of the lappage were visible on the ground, although the claimant must establish the required adverse possession within those lines. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

#### B. Character of Possession.

##### Continuity and Duration.—

To claim adverse possession, there must be a continuous possession of public notoriety. Occasional entries upon the land will not serve, for they may either be not observed, or if observed, may not be con-



sidered as the assertion of rights. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

**Adverse possession is denoted by the exercise of acts of dominion over the land in making the ordinary use and taking the ordinary profits of which it is susceptible, such acts to be so repeated as to show that they are done in the character of owner, and not merely as an occasional trespasser.** *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

**Cutting Timber or Pulpwood.**—When cutting timber or pulpwood is relied upon to show adverse possession it must be kept up with such frequency and regularity as to give notice to the public that the party cutting or having it cut is claiming the land as his own. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

**Giving permission to hunt**, like the payment of taxes, is evidence of an adverse claim, but is not possession. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

## II. NOTE TO SECTION 1-38.

### Color of Title Defined.—

Color of title is generally defined as a written instrument which purports to convey the land described therein but fails to do so because of a want of title in the grantor or some defect in the mode of conveyance. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

**A deed is color of title, but color of title is not sufficient to make a prima facie case of title.** *King v. Lee*, 9 N.C. App. 369, 176 S.E.2d 394 (1970).

### § 1-39. Seizing within twenty years necessary.

**Cited in** *McRorie v. Shinn*, 11 N.C. App. 475, 181 S.E.2d 773 (1971).

### § 1-40. Twenty years adverse possession.

#### Editor's Note.—

For article on recent developments in North Carolina law of eminent domain, see 48 N.C.L. Rev. 767 (1970). For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

**Entry into Possession with Permission of Owner.**—If a person enters into possession of a piece of land with the permission of the owner, such possession would not be adverse unless and until the plaintiff disclaimed such arrangement and made the owner aware of such disclaimer or disclaimed the arrangement in such manner as to put the owner on notice that the person was no longer using the land by permission but was claiming it as absolute owner. Wil-

**The color of title must be strengthened by possession**, which must be open, notorious, and adverse for a period of seven years. *King v. Lee*, 9 N.C. App. 369, 176 S.E.2d 394 (1970).

**Nothing Must Be Left to Conjecture.**—In proving title by continuous, open and adverse possession of land under color of title for seven years, nothing must be left to conjecture. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

### Sufficiency of Paper to Constitute Color—Valid Deed.—

A valid deed—a muniment of title—may also serve as color of title. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

**Same — Deed Describing Contiguous Land Not Owned by Vendor.**—When the description in a deed embraces not only land owned by the grantor but also contiguous land which he does not own, the instrument conveys the property to which grantor had title and constitutes color of title to that portion which he does not own. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

**Possession of Vendee of Part of Tract Does Not Inure to Benefit of Vendor.**—Where the purchase is of part of a tract of land, the vendee's possession will not inure to the benefit of the vendor as to the remainder of the tract for the purpose of showing possession of the tract by the vendor. *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969).

**Cited in** *McRorie v. Shinn*, 11 N.C. App. 475, 181 S.E.2d 773 (1971).

*son County Bd. of Educ. v. Lamm*, 276 N.C. 487, 173 S.E.2d 281 (1970).

**Purchase of Adverse Claim.**—A party is not bound to admit, and does not necessarily admit, title in another because he prefers to get rid of that other's claim by purchasing it. He has a right to quiet his possession and protect himself from litigation in any lawful mode that appears to him most advantageous or desirable. To hold otherwise would compel him to litigate adverse claims, or, by buying one, forego any right to claim the benefit of the statute of limitations as to all others. The acts and declarations of the possessor may, doubtless, be given in evidence with a view of showing the character of his claim, but whether the possession is adverse or not is



a question for the jury to determine upon all the evidence. *Wilson County Bd. of Educ. v. Lamm*, 276 N.C. 487, 173 S.E.2d 281 (1970).

Cited in *Hoyle v. City of Charlotte*, 276 N.C. 292, 172 S.E.2d 1 (1970); *McRorie v. Shinn*, 11 N.C. App. 475, 181 S.E.2d 773 (1971).

**§ 1-42. Possession follows legal title; severance of surface and subsurface rights.**

**Editor's Note.—**

For article "Transferring North Carolina Real Estate Part I: How the Present Sys-

tem Functions," see 49 N.C.L. Rev. 413 (1971).

**§ 1-42.1. Certain ancient mineral claims extinguished.**

**Editor's Note.—**

For article "Transferring North Carolina Real Estate Part I: How the Present Sys-

tem Functions," see 49 N.C.L. Rev. 413 (1971).

**§ 1-42.2. Certain additional ancient mineral claims extinguished; oil, gas and mineral interests to be recorded and listed for taxation.—**

(a) Where it appears on the public records that the fee simple title to any oil, gas or mineral interests in an area of land has been severed or separated from the surface fee simple ownership of such land and such interest is not in actual course of being mined, drilled, worked or operated, or in the adverse possession of another, or that the record titleholder of any such oil, gas or mineral interests has not listed the same for ad valorem tax purposes in the county in which the same is located for a period of 10 years prior to January 1, 1971, any person, having the legal capacity to own land in this State, who has on September 1, 1971 an unbroken chain of title of record to such surface estate of such area of land for at least 50 years and provided such surface estate is not in the adverse possession of another, shall be deemed to have a marketable title to such surface estate as provided in the succeeding subsections of this section, subject to such interests and defects as are inherent in the provisions and limitations contained in the muniments of which such chain of record title is formed.

(b) Such marketable title shall be held by such person and shall be taken by his successors in interest free and clear of any and all such fee simple oil, gas or mineral interests in such area of land founded upon any reservation or exception contained in an instrument conveying the surface estate in fee simple which was executed or recorded at least 50 but not more than 56 years prior to September 1, 1971, and such oil, gas or mineral interests are hereby declared to be null and void and of no effect whatever at law or in equity: Provided, however, that any such fee simple oil, gas or mineral interest may be preserved and kept effective by recording within two years after September 1, 1971, a notice in writing duly sworn to and subscribed before an official authorized to take probate by G.S. 47-1, which sets forth the nature of such oil, gas or mineral interest and gives the book and page where recorded. Such notice shall be probated as required for registration of instruments by G.S. 47-14 and recorded in the office of the register of deeds of the county wherein such area of land, or any part thereof lies, and in the book therein kept or provided under the terms of G.S. 1-42 for the purpose of recording certain severances of surface and subsurface land rights, and shall state the name and address of the claimant and, if known, the name of the surface owner and also contain either such a description of the area of land involved as to make said property readily located thereby or due incorporation by reference of the recorded instrument containing the reservation or exception of such oil, gas or mineral interest. Such notice may be made and recorded by the claimant or by any other person acting on behalf of any claimant who is either under a disability, unable to assert a claim on his own behalf, or one of a class but whose identity cannot be established or is uncertain at the time of filing such notice of claim for record.

(c) This section shall be construed to effect the legislative purpose of facilitating



land title transactions by extinguishing certain ancient oil, gas or mineral claims unless preserved by recording as herein provided. The oil, gas or mineral claims hereby extinguished shall include those of persons whether within or without the State, and whether natural or corporate, but shall exclude governmental claims, State or federal, and all such claims by reason of unexpired oil, gas or mineral releases.

(d) Within two years from November 1, 1971, all oil, gas or mineral interests in lands severed or separated from the surface fee simple ownership must be listed for ad valorem taxes and notice of such interest must be filed in writing in the manner provided by G.S. 1-42.2(b) and recorded in the local registry in the book provided by G.S. 1-42, to be effective against the surface fee simple owner or creditors, purchasers, heirs or assigns of such owner. Subsurface oil, gas and mineral interests shall be assessed for ad valorem taxes as real property and such taxes shall be collected and foreclosed in the manner authorized by Chapter 105 of the General Statutes of North Carolina. The board of county commissioners shall publish a notice of this subsection in a newspaper published in the county or having general circulation in the county once a week for four consecutive weeks prior to November 1, 1971.

The provisions of this subsection shall apply to the following counties: Rowan, Anson, Buncombe, Catawba, Davidson, Durham, Franklin, Guilford, Haywood, Hoke, Iredell, Jackson, Madison, Montgomery, Moore, Person, Richmond, Robeson, Scotland, Swain, Transylvania, Union, Wake, Warren and Yancey. (1971, c. 235, s. 1; c. 855.)

**Editor's Note.**—Session Laws 1971, c. 235, s. 2, makes the act effective Sept. 1, 1971.

The 1971 amendment, effective Sept. 1, 1971, added subsection (d).

### § 1-45. No title by possession of public ways.

**Acquisition of Right Superior to Others Except State Not Prevented.**—While this section prevents a person from acquiring an exclusive right to land, it does not prevent a person from acquiring a right superior to that of all other persons save the State. *Saddle Club, Inc. v. Gibson*, 9 N.C. App. 565, 176 S.E.2d 846 (1970).

**A stipulation that certain land is within a right-of-way of the Highway Department** indicates only that the State has a superior

right, if it chooses to exercise it, to the land. *Saddle Club, Inc. v. Gibson*, 9 N.C. App. 565, 176 S.E.2d 846 (1970).

**Does Not Preclude Person from Acquiring Lawful Possession.**—The rights of the State do not preclude a person from acquiring actual, lawful possession, if the evidence is sufficient to support a finding of fact to that effect. *Saddle Club, Inc. v. Gibson*, 9 N.C. App. 565, 176 S.E.2d 846 (1970).

## ARTICLE 5.

### *Limitations, Other than Real Property.*

### § 1-46. Periods prescribed.

The purpose of a statute of limitations is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**Statutes of limitations are inflexible and unyielding.** They operate inexorably without reference to the merits of plaintiff's cause of action. They are statutes of repose, intended to require that litigation be initiated within the prescribed time or not at all. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

The court has no discretion when considering whether a claim is barred by the statute of limitations. A judge may not, in his discretion, interfere with the vested rights of a party where pleadings are concerned. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**Right of Defendant to Rely on Statute as a Defense.**—The statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a defense. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).



**§ 1-52. Three years.**—Within three years an action—

- (1) Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections.
- (2) Upon a liability created by statute, other than a penalty or forfeiture, unless some other time is mentioned in the statute creating it.
- (3) For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.
- (4) For taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery.
- (5) For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.
- (6) Against the sureties of any executor, administrator, collector or guardian on the official bond of their principal; within three years after the breach thereof complained of.
- (7) Against bail; within three years after judgment against the principal; but bail may discharge himself by a surrender of the principal, at any time before final judgment against the bail.
- (8) For fees due to a clerk, sheriff or other officer, by the judgment of a court; within three years from the rendition of the judgment, or the issuing of the last execution thereon.
- (9) For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.
- (10) For the recovery of real property sold for the nonpayment of taxes, within three years after the execution of the sheriff's deed.
- (11) For the recovery of any amount under and by virtue of the provisions of the Fair Labor Standards Act of 1938 and amendments thereto, said act being an act of Congress.
- (12) Upon a claim for loss covered by an insurance policy which is subject to the three-year limitation contained in lines 158 through 161 of the Standard Fire Insurance Policy for North Carolina, G.S. 58-176(c). (C. C. P., s. 34; Code, s. 155; 1889, cc. 218, 269; 1895, c. 165; 1899, c. 15, s. 71; 1901, c. 558, s. 23; Rev., s. 395; 1913, c. 147, s. 4; C. S., s. 441; 1945, c. 785; 1971, c. 939, s. 1.)

V-A. Subdivision (5)—Injury to Person or Rights of Another.

**I. IN GENERAL.**

**Editor's Note.—**

The 1971 amendment, effective Jan. 1, 1972, added subdivision (12).

For note on when a cause of action accrues for limitations purposes in medical malpractice—the discovery rule, see 6 Wake Forest Intra. L. Rev. 532, (1970). For article "Transferring North Carolina Real Estate Part I: How the Present System Functions," see 49 N.C.L. Rev. 413 (1971).

**The purpose of a statute of limitations** is to afford security against stale demands, not to deprive anyone of his just rights by lapse of time. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**Statutes of limitations are inflexible and unyielding.** They operate inexorably without reference to the merits of plaintiff's

cause of action. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970); *Wheless v. St. Paul Fire & Marine Ins. Co.*, 11 N.C. App. 348, 181 S.E.2d 144 (1971).

**Statutes of limitations are statutes of repose,** intended to require that litigation be initiated within the prescribed time or not at all. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**Burden of Proving Section.—**

The statute of limitations having been pleaded, the burden is on the plaintiff to show that his cause of action against the defendant accrued within three years prior to the institution of the suit. *State v. Cessna Aircraft Corp.*, 9 N.C. App. 557, 176 S.E.2d 796 (1970).

**When Cause of Action Accrues.—**

The period of the statute of limitations begins to run when the plaintiff's right to maintain an action for the wrong alleged



accrues. The cause of action accrues when the wrong is complete, even though the injured party did not then know the wrong had been committed. *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873 (1970).

Insofar as the time of the accrual of the cause of action for the commencement of the running of the statute of limitations is concerned, there is no difference between a cause of action for negligent damage to property, and a cause of action for negligent injury to person. *Land v. Neill Pontiac, Inc.*, 6 N.C. App. 197, 169 S.E.2d 537 (1969).

The cause of action accrued, and the statute of limitations began running with respect to plaintiff's claim under the uninsured motorist provisions of the insurance policy issued by defendant, at the time damages were sustained, and not, as the plaintiff contended, when demand for payment under the policy was made and refused by defendant. *Wheless v. St. Paul Fire & Marine Ins. Co.*, 11 N.C. App. 348, 181 S.E.2d 144 (1971).

The claim accrues at the time of the invasion of the right, and nominal damages, at least, flow from such invasion. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

In an action to recover damages from defendant attorneys-at-law, for failing properly to file a cause of action on behalf of the plaintiff, the claim accrued at the time of the filing of the defective summons. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

Generally, a cause of action accrues to an injured party so as to start the running of the statute of limitations when he is at liberty to sue, being at that time under no disability. *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 277 N.C. 216, 176 S.E.2d 751 (1970); *Wheless v. St. Paul Fire & Marine Ins. Co.*, 11 N.C. App. 348, 181 S.E.2d 144 (1971).

#### **When the Statute, etc.—**

In accord with original. See *Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 277 N.C. 216, 176 S.E.2d 751 (1970); *Wheless v. St. Paul Fire & Marine Ins. Co.*, 11 N.C. App. 348, 181 S.E.2d 144 (1971).

Once the statute of limitations begins to run against an action, it continues to run. *Sheppard v. Barrus Constr. Co.*, 11 N.C. App. 358, 181 S.E.2d 130 (1971).

**Right of Defendant to Rely on Statute as a Defense.**—The statute of limitations operates to vest a defendant with the right to rely on the statute of limitations as a de-

fense. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

The court has no discretion when considering whether a claim is barred by the statute of limitations. A judge may not, in his discretion, interfere with the vested rights of a party where pleadings are concerned. *Congleton v. City of Asheboro*, 8 N.C. App. 571, 174 S.E.2d 870 (1970).

**Operation of Statute Not Interrupted by Unavailability of Information.**—The unavailability of information concerning a fact which must be proved in order for a plaintiff to recover does not interrupt or delay the operation of the statute of limitations. *Wheless v. St. Paul Fire & Marine Ins. Co.*, 11 N.C. App. 348, 181 S.E.2d 144 (1971).

The fact that a person, in good faith, pursued another remedy, which turned out to be unavailable, does not extend the time allowed by the statute for the institution of another action. *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873 (1970).

**Mere Assertion Is Insufficient Plea of Statute.**—The mere assertion, without any allegation of facts to support it, that the plaintiff's cause of action is barred by the statute has repeatedly been held insufficient to constitute the plea in bar. *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873 (1970).

If the plaintiff's claim is barred by the running of the statute of limitations, defendant is entitled to judgment as a matter of law and summary judgment, under Rule 56, is appropriate. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

A judgment on the pleadings in favor of a defendant on defendant's plea in bar of the statute of limitations is proper when all the facts necessary to establish said plea are alleged or admitted in plaintiff's pleadings. *Land v. Neill Pontiac, Inc.*, 6 N.C. App. 197, 169 S.E.2d 537 (1969).

Quoted in *Hoyle v. City of Charlotte*, 276 N.C. 292, 172 S.E.2d 1 (1970).

Cited in *Estridge v. Crab Orchard Dev. Co.*, 5 N.C. App. 604, 169 S.E.2d 53 (1969); *Tippett v. Liggett & Myers Tobacco Co.*, 316 F. Supp. 292 (M.D.N.C. 1970).

## **II. SUBDIVISION (1)—CONTRACTS.**

**Warranty That Subject Matter of Sale Is Sound.**—Where there is a warranty that the subject matter of a sale is sound at the date of sale, then the statute of limitations begins to run at the date of the warranty and not thereafter. *Styron v. Loman-Garrett Supply Co.*, 6 N.C. App. 675, 171 S.E.2d 41 (1969).



Where a warranty that the subject matter of a sale is sound has been construed as a contract by the vendor that if the vendee shall suffer damages resulting from a prospective as well as a present condition, it has been held that the statute of limitations runs from the date on which the vendee discovered or should have discovered the breach of warranty; in other cases it has been held that the statute begins to run only after the lapse of a reasonable time within which both the vendor and the vendee had an opportunity to discover, by test, whether or not there has been a breach of the warranty. In the latter case, it has been said that where the vendor and the vendee, as contemplated by them when the contract was entered into, were engaged for some time after the date of the warranty in making tests to determine whether or not there had been a breach of the warranty, this time was a criterion as to the time required for that purpose. *Styron v. Loman-Garrett Supply Co.*, 6 N.C. App. 675, 171 S.E.2d 41 (1969).

**Breach of Agreement or Tortious Invasion of Right.** — Where there is either a breach of an agreement or a tortious invasion of a right for which the party aggrieved is entitled to recover even nominal damages, the statute of limitations immediately begins to run against the party aggrieved, unless he is under one of the disabilities specified in § 1-17. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

**Failure of Complaint to Allege Subsequent Breach.** — Whether the claim sounds in contract or in tort makes no difference in regard to the outcome where the complaint, if it in fact sounds in contract, fails to allege any subsequent breach of the contract that would begin anew the running of the statute of limitations. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

It is unimportant that the actual or the substantial damage does not occur until later if the whole injury results from the original tortious act. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

**Or That Consequences Are Not Discovered or Discoverable When Cause of Action Accrues.** — It is unimportant that the harmful consequences of the breach of duty or of contract were not discovered or discoverable at the time the cause of action accrued. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

### III. SUBDIVISION (2)—LIABILITY CREATED BY STATUTE.

**Creditor's Action for Relief under § 23-1.** — The three-year statute of limitation ap-

plies to a creditor's action for relief under § 23-1. *Wilson v. Crab Orchard Dev. Co.*, 5 N.C. App. 600, 169 S.E.2d 50 (1969), *aff'd*, 276 N.C. 198, 171 S.E.2d 873 (1970).

### V-A. SUBDIVISION (5)—INJURY TO PERSON OR RIGHTS OF ANOTHER.

**Statute Applicable in Action for Personal Injuries.** — The three-year statute of limitations applied in an action for personal injuries allegedly received by the plaintiff as the result of negligence on the part of the defendant. *Sheppard v. Barrus Constr. Co.*, 11 N.C. App. 358, 181 S.E.2d 130 (1971).

**When Statute Begins to Run.** — The statute of limitations by its terms begins to run after the action has "accrued." A suit does not involve an "injury to the person or rights of another" until the plaintiff is hurt. Where plaintiff was injured in an accident allegedly caused by failure of a tire, there was no "injury" and no basis for action until the wreck occurred. *Stell v. Firestone Tire & Rubber Co.*, 306 F. Supp. 17 (W.D.N.C. 1969).

The three-year statute of limitations began to run against a minor plaintiff's claim when a next friend was appointed for the special purpose of instituting an action on the claim. *Sheppard v. Barrus Constr. Co.*, 11 N.C. App. 358, 181 S.E.2d 130 (1971).

### IX. SUBDIVISION (9)—FRAUD OR MISTAKE.

#### Scope of Words, etc.—

It will be noted from the language, "relief on the ground of fraud," that subdivision (9) has and was intended to have broader meaning than the ordinary common-law actions for fraud and deceit, and clearly applies to any and all actions legal or equitable where fraud is the basis or an essential element of the action. *Cooper v. Floyd*, 9 N.C. App. 645, 177 S.E.2d 442 (1970).

Subdivision (9) applies to all actions where fraud is the basis or an essential element. *Cooper v. Floyd*, 9 N.C. App. 645, 177 S.E.2d 442 (1970).

And fraud is the gist of forgery. *Cooper v. Floyd*, 9 N.C. App. 645, 177 S.E.2d 442 (1970).

**Claims Grounded on Alleged Forgery.** — The same reasons that induced enactment of a statute of limitations for relief on the grounds of fraud under subdivision (9) are equally relevant to claims grounded on alleged forgery. *Cooper v. Floyd*, 9 N.C. App. 645, 177 S.E.2d 442 (1970).



**When Statute Begins to Run.—**

In accord with 3rd paragraph in original. See *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873 (1970).

**An action to set aside a deed on the grounds of forgery** is an action for relief on the grounds of fraud. *Cooper v. Floyd*, 9 N.C. App. 645, 177 S.E.2d 442 (1970).

**§ 1-53. Two years.****II. SUBDIVISION (2)—PENALTY FOR USURY.**

**Editor's Note.** — For comment on usury law in North Carolina, see 47 N.C.L. Rev. 761 (1969).

**Cited in** *Hodge v. First Atl. Corp.*, 10 N.C. App. 632, 179 S.E.2d 855 (1971).

**IV. SUBDIVISION (4)—DEATH BY WRONGFUL ACT.****Action Brought by Party Who Has Not Been Appointed Personal Representative.**

—A party who has not been appointed as administratrix and has not offered herself for qualification may not, upon a false allegation that she has qualified as administratrix, commence an action for wrongful death and, following the expiration of the statute of limitations, validate that action by a subsequent appointment as administratrix. *Reid v. Smith*, 5 N.C. App. 646, 169 S.E.2d 14 (1969).

**§ 1-54. One year.**—Within one year an action or proceeding—

- (7) Repealed by Session Laws 1971, c. 939, s. 2. (C. C. P., s. 35; Code, s. 156; 1885, c. 96; Rev., s. 397; C. S., s. 443; 1933, c. 529, s. 1; 1951, c. 837, s. 2; 1965, c. 9; 1969, c. 1001, s. 2; 1971, c. 12; c. 939, s. 2.)

**Editor's Note.—**

Session Laws 1971, c. 12, added to this section a new subdivision (7), reading as follows:

"(7) On a claim for loss covered by an insurance policy which is subject to the 12-month limitation contained in lines 158 through 161 of the Standard Fire Insurance Policy for North Carolina, G.S. 58-176(c)."

Session Laws 1971, c. 12, was repealed, effective Jan. 1, 1972, by Session Laws 1971, c. 939, s. 2. See § 1-52, subdivision (12), and see the note to § 58-176.

As subdivisions (1) to (6) were not changed by the 1971 acts, they are not set out.

**Relation Back of Supplementary Pleadings.**—There can be no relation back of supplementary pleadings where at the time the suits were instituted no actionable damages existed, nor did the claims alleged

**Is Barred after Three Years from Date of Knowledge of Forgery.**—And such an action is barred after three years from the date of knowledge of the forgery of subdivision (9). *Cooper v. Floyd*, 9 N.C. App. 645, 177 S.E.2d 442 (1970).

Where a widow institutes an action, as administratrix, for damages for the wrongful death of her husband, under the mistaken belief that she has been duly appointed and has qualified as such, and thereafter discovers her error and amends her petition so as to show that she was appointed administratrix after the expiration of the statute of limitation applicable to such action, the amended petition will relate back to the date of the filing of the petition, and the action will be deemed commenced within the time limited by statute. *Reid v. Smith*, 5 N.C. App. 646, 169 S.E.2d 14 (1969).

**Applied in** *Simmons v. Wilder*, 6 N.C. App. 179, 169 S.E.2d 480 (1969); *Groce v. Rapidair, Inc.*, 305 F. Supp. 1238 (W.D.N.C. 1969).

become actionable within the time provided by statute for the instituting of suits in slander actions. *Williams v. Rutherford Freight Lines*, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

The case law is not clearly developed on the extent to which a supplemental complaint will be held to relate back for statute of limitations purposes. *Williams v. Rutherford Freight Lines*, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

**Subdivision (3)—Action for Slander.** —

In a slander action, the claims did not become actionable within the time provided by statute for the institution of suits in slander actions, because the statute of limitations began to operate when the alleged false statements were made, and the first possible element of special damage occurred after the statute had run. *Williams v. Rutherford Freight Lines*, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

**§ 1-55. Six months.****Editor's Note.—**

The cases under this section in the bound volume were decided prior to passage of Session Laws 1969, c. 1001, ss. 1, 2, which

deleted an action for slander from this section and inserted such action in subdivision (3) of § 1-54.

**ARTICLE 5A.***Limitations, Actions Not Otherwise Limited.***§ 1-56. All other actions, ten years.****I. IN GENERAL.****When Statute Begins Running.—**

In the absence of a demand and refusal, the statute of limitations in an action to impose a constructive trust upon an administrator does not begin to run until the administrator completes and closes the administration. *Moore v. Bryson*, 11 N.C. App. 149, 180 S.E.2d 437 (1971).

**Right of Action for Legacies and Distributive Shares or for Accounting.—**"The

right of action for legacies and distributive shares, or to have an accounting with an executor and a settlement, accrues two years from his qualification." *Moore v. Bryson*, 11 N.C. App. 149, 180 S.E.2d 437 (1971) quoting, *Pierce v. Faison*, 183 N.C. 177, 110 S.E. 857 (1922).

**Cited in** *Hoyle v. City of Charlotte*, 276 N.C. 292, 172 S.E.2d 1 (1970); *In re Will of Spinks*, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

**SUBCHAPTER IIIA. JURISDICTION.****ARTICLE 6A.***Jurisdiction.***§ 1-75.1. Legislative intent.**

**Cited in** *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

**§ 1-75.3. Jurisdictional requirements for judgments against persons, status and things.**

**Quoted in** *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

**§ 1-75.4. Personal jurisdiction, grounds for generally.****Editor's Note.—**

For note on constitutionality of constructive service of process on missing defendants, see 48 N.C.L. Rev. 616 (1970). For article on modern statutory approaches to

service of process outside the State, see 49 N.C.L. Rev. 235 (1971).

**Quoted in** *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

**§ 1-75.10. Proof of service of summons, defendant appearing in action.****Editor's Note.—**

For article on the legislative changes to

the new rules of civil procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

**§ 1-75.11. Judgment against nonappearing defendant, proof of jurisdiction.**

**Valid Judgment against Nonappearing Defendant.—**In order for a valid judgment to be entered in an action against a nonappearing defendant, there must be compliance with the provisions of § 1A-1, Rule 55, as well as this section. *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

**Personal jurisdiction over a nonappearing defendant for the purpose of the entry**

of a judgment by default is not presumed by the service of summons and an unverified complaint but must be proven and appear of record as required by this section. *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

**Proof of service of summons is only part of the proof necessary to establish grounds for personal jurisdiction before entering the**



judgment. *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

**Summons, Certificate and Complaint Insufficient to Establish Jurisdiction for Default Judgment.**—The summons, the certificate of the officer serving it, and the unverified complaint are insufficient to establish the jurisdictional requirements for a default judgment. *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

**Record Must Show Jurisdiction.**—For the failure of the record to show personal jurisdiction of the defendant by the court, the judgment entered was void and could be considered and treated as a nullity. *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

## SUBCHAPTER IV. VENUE.

### ARTICLE 7.

#### *Venue.*

### § 1-76. Where subject of action situated.

#### I. IN GENERAL.

##### **Local and Transitory Actions, etc.—**

In accord with 1st paragraph of original. See *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

An action to recover monetary damages for breach of a contract to construct a house is transitory and is not a local action within the meaning of subdivision (1), since plaintiff's purpose is not to recover real property, not to determine an estate or interest in land, and not to recover for damages to realty. *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

If the principal object involved in an action is monetary damages, and plaintiffs do not seek a judgment that would affect an interest in land, but seek a judgment in personam, it is not a local action within the meaning of subdivision (1), and defendants are not entitled to have the action removed as a matter of right. *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

**Principal Object Involved Determines Whether Action Is Local.**—It is the principal object involved in the action which determines the question, and if title is principally involved or if the judgment or decree operates directly and primarily on the estate or title, and not alone in personam against the parties, the action

will be held local. *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

**An action is not necessarily local because it incidentally involves the title to land or a right or interest therein.** *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

**Title to realty must be directly affected by the judgment**, in order to render the action local. *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

#### II. ACTIONS RELATING TO REAL PROPERTY.

##### **Docketed judgments, etc.—**

A lien created by a docketed judgment does not confer an estate or interest in real estate within the meaning of this section, but merely the right to subject the realty to the payment of the judgment by sale of the same under execution. *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E.2d 237 (1970).

**Notice of Claim of Lien Confers no Greater Right in Real Estate than Docketed Judgment.**—Mere notice of a claim of lien would not confer a greater right or interest in the real estate than a docketed judgment and would not bring this action within the purview of subdivision (1). *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E.2d 772 (1970).

### § 1-77. Where cause of action arose.

**Deputy sheriffs of a county are "public officers"** for purposes of the change of

venue statute. *Galligan v. Smith*, 10 N.C. App. 536, 179 S.E.2d 193 (1971).

**§ 1-80. Foreign corporations.**—An action against a corporation created by or under the law of any other state or government may be brought in the appropriate trial court division of any county in which the cause of action arose, or in which the corporation usually did business, or has property, or in which the plaintiffs, or either of them, reside, in the following cases:

(1) By a resident of this State, for any cause of action.

- (2) By a nonresident of this State in any county where he or they are regularly engaged in carrying on business.
- (3) By a plaintiff, not a resident of this State, when the cause of action arose or the subject of the action is situated in this State. (C. C. P., s. 361; 1876-7, c. 170; Code, s. 194; Rev., s. 423; 1907, c. 460; C. S., s. 467; 1971, c. 268, s. 1.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, substituted "appro-

priate trial court division" for "superior court" in the opening paragraph.

### § 1-83. Change of venue.

#### I. IN GENERAL.

This section allows removal to a non-adjointing county. Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

Removal of a case "when the convenience of witnesses and ends of justice would be promoted" under the provisions of this section is not limited to removal to an adjoining county. Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

#### IV. APPEAL.

##### B. Convenience of Witnesses and Ends of Justice Promoted.

###### Discretion of Court.—

A motion to remove when the conve-

nience of witnesses and ends of justice would be promoted is addressed to the sound discretion of the trial judge. Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

The rule of law governing motions for removal for the causes specified, is thus declared: The distinction seems to be where there are no facts stated in the affidavit as grounds for the removal, the ruling of the court below may be reviewed; but where there are facts set forth, their sufficiency rests in the discretion of the judge and his decision upon them is final. Patrick v. Hurdle, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

**§ 1-84. Removal for fair trial.**—In all civil and criminal actions in the superior and district courts, when it is suggested on oath or affirmation, on behalf of the State or the traverser of the bill of indictment, or of the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the county in which the action is pending, the judge may order a copy of the record of the action removed to some adjacent county for trial, if he is of the opinion that a fair trial cannot be had in said county, after hearing all the testimony offered on either side by affidavits: Provided, that when a case has been removed to another county for trial on motion of the solicitor, the defendant may, upon call of the case for trial, object to trial therein and move that the case be sent for trial to some other county adjacent to the county from which removed, and in the event the objection is overruled, the defendant may forthwith appeal. If the motion of the defendant is sustained the judge shall order the case tried in some other county adjacent to the county from which the case was first removed. If, upon appeal, the court shall find error in the order denying the motion or if it shall suggest that the case probably ought to be removed then, and in such event, it shall be the duty of the judge at the next session of court of the county to which the case was first removed to order the case sent for trial to some other county adjacent to the county where the bill of indictment was found. (1806, c. 693, s. 12, P. R.; 1879, s. 45; Code, s. 196; 1899, cc. 104, 508; Rev., s. 426; 1917, c. 44; C. S., s. 471; 1957, c. 601; 1969, c. 44, s. 1; 1971, c. 268, s. 2.)

###### Editor's Note.—

The 1971 amendment, effective July 1, 1971, substituted "district" for "criminal" near the beginning of the first sentence and deleted "to the appellate division" at the end of the proviso to that sentence, substituted "court" for "appellate division" near the beginning of the third sentence and deleted the former last sentence, relating to payment of costs and jurors' fees.

###### Inherent Power of Trial Judge to Order

**Removal Ex Mero Motu.** — In addition to the express statutory authority granted in this section, the judge of superior court has the inherent discretionary power to order a change of venue ex mero motu when, because of existing circumstances, a fair and impartial trial cannot be had in the county in which the action is pending. Everett v. Town of Robersonville, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

The sworn testimony of witnesses at the



trial and the court's own observation of the events transpiring at the trial furnish a sufficient basis for the court to invoke its inherent discretionary power to order the removal in the furtherance of justice. The fact that plaintiffs had filed and later renewed a motion to remove would not compel the court to proceed only under the statutory authority and to forego exercise of its inherent judicial power. *Everett v. Town of Robersonville*, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

#### **Discretion of Trial Judge.—**

A motion to remove for prejudice under this section is addressed to the sound discretion of the trial judge. *Patrick v. Hurdle*, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

A defendant's motion for a change of venue and his alternative motion for a special venire from another county are addressed to the sound legal discretion of the trial court. *State v. Penley*, 6 N.C. App. 455, 170 S.E.2d 632 (1969).

A motion for change of venue or, in the alternative, that a jury be summoned from another county, on the ground that a fair and impartial trial cannot be obtained in the county in which the action is pending, is addressed to the sound discretion of the trial court. *Everett v. Town of Robersonville*, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

A defendant's motions for a change of venue or for a special venire from another county on the ground that he could not get a fair and impartial trial in the county because of extensive publicity and public discussion of the cases, were addressed to the sound legal discretion of the trial court, whose ruling in denying these motions was not disturbed on appeal because (1) the newspaper articles filed in support of the motions were not unduly inflammatory in

nature, (2) the articles were published three months prior to the trial and there was no evidence of repeated or excessive publication, and (3) those of the prospective jurors who had read the newspaper accounts stated that they could return an impartial verdict. *State v. Penley*, 6 N.C. App. 455, 170 S.E.2d 632 (1969).

#### **Second Exercise of Discretion in Light of Changed Situation. —**

On a motion for change of venue the court must exercise its discretion in the light of the situation existing when the decision is made. Should thereafter some significant change occur, it may become necessary, in the interest of assuring a fair trial, that the trial court be called upon again to exercise its discretion. In such case the discretion should be exercised in the light of the changed situation, and there is nothing in this section or in the rule which limits the power of one superior court judge to reverse a judgment of another, which prevents that this be done. *Everett v. Town of Robersonville*, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

#### **Case Must Be Removed to Adjoining County.—**

Removal of a case for a "fair trial" under the provisions of this section is limited to removal to an adjoining county. *Patrick v. Hurdle*, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

#### **Appeal.—**

In accord with 3rd paragraph in original. See *Patrick v. Hurdle*, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

Where facts are set forth in the affidavit, their sufficiency rests in the discretion of the judge and his decision upon them is final; but where no facts are stated in the affidavit as grounds for removal, the ruling of the trial court may be reviewed on appeal. *Everett v. Town of Robersonville*, 8 N.C. App. 219, 174 S.E.2d 116 (1970).

### **§ 1-85. Affidavits on hearing for removal; when removal ordered.**

When a motion to remove is made, facts must be stated particularly and in detail in the affidavit, or judicially admitted, showing

the grounds for such removal. *Patrick v. Hurdle*, 6 N.C. App. 51, 169 S.E.2d 239 (1969).

## **SUBCHAPTER V. COMMENCEMENT OF ACTIONS.**

### **ARTICLE 8.**

#### ***Summons.***

§§ 1-92, 1-93: Repealed by Session Laws 1971, c. 268, s. 34, effective July 1, 1971.

§§ 1-98.1 to 1-98.4: Repealed by Session Laws 1971, c. 1093, s. 19.

§§ 1-99.1 to 1-99.4: Repealed by Session Laws 1971, c. 1093, s. 19.



**§ 1-105. Service upon nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles.**—The acceptance by a nonresident of the rights and privileges conferred by the laws now or hereafter in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways of this State, or at any other place in this State, or the operation by such nonresident of a motor vehicle on the public highways of this State or at any other place in this State, other than as so permitted or regulated, shall be deemed equivalent to the appointment by such nonresident of the Commissioner of Motor Vehicles, or his successor in office, to be his true and lawful attorney and the attorney of his executor or administrator, upon whom may be served all summonses or other lawful process in any action or proceeding against him or his executor or administrator, growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highways of this State, or at any other place in this State, and said acceptance or operation shall be a signification of his agreement that any such process against him or his executor or administrator shall be of the same legal force and validity as if served on him personally, or on his executor or administrator.

Service of such process shall be made in the following manner :

- (1) By leaving a copy thereof, with a fee of one dollar (\$1.00), in the hands of the Commissioner of Motor Vehicles, or in his office. Such service, upon compliance with the other provisions of this section shall be sufficient service upon the said nonresident.
- (2) Notice of such service of process and copy thereof must be forthwith sent by registered mail by plaintiff or the Commissioner of Motor Vehicles to the defendant, and the entries on the defendant's return receipt shall be sufficient evidence of the date on which notice of service upon the Commissioner of Motor Vehicles and copy of process were delivered to the defendant, on which date service on said defendant shall be deemed completed. If the defendant refuses to accept the registered letter, service on the defendant shall be deemed completed on the date of such refusal to accept as determined by notations by the postal authorities on the original envelope, and if such date cannot be so determined, then service shall be deemed completed on the date that the registered letter is returned to the plaintiff or Commissioner of Motor Vehicles, as determined by postal marks on the original envelope. If the registered letter is not delivered to the defendant because it is unclaimed, or because he has removed himself from his last known address and has left no forwarding address or is unknown at his last known address, service on the defendant shall be deemed completed on the date that the registered letter is returned to the plaintiff or Commissioner of Motor Vehicles.
- (3) The defendant's return receipt, or the original envelope bearing a notation by the postal authorities that receipt was refused, and an affidavit by the plaintiff that notice of mailing the registered letter and refusal to accept was forthwith sent to the defendant by ordinary mail, together with the plaintiff's affidavit of compliance with the provisions of this section must be appended to the summons or other process and filed with said summons, complaint and other papers in the cause.

Provided, that where the nonresident motorist has died prior to the commencement of an action brought pursuant to this section, service of process shall be made on the executor or administrator of such nonresident motorist in the same manner and on the same notice as if provided in the case of a nonresident motorist.



The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action. (1929, c. 75, s. 1; 1941, c. 36, s. 4; 1951, c. 646; 1953, c. 796; 1955, c. 1022; 1961, c. 1191; 1963, c. 491; 1967, c. 954, s. 4; 1971, c. 420, s. 2.)

**Editor's Note.** — This section was repealed, effective Jan. 1, 1970, by Session Laws 1967, c. 954, s. 4.

Session Laws 1971, c. 420, s. 1, effective July 1, 1971, provides: "Section 4 of Chapter 954 of the 1967 Session Laws is hereby amended by deleting G.S. 1-105 and G.S. 1-105.1 from the list of repealed General Statutes sections."

For case law survey on process, see 41 N.C.L. Rev. 524. For case law survey on pleading and parties, see 43 N.C.L. Rev. 873 (1965). For case law survey on trial practice, see 43 N.C.L. Rev. 938 (1965). For an article, "Modern Statutory Approaches to Service of Process outside the State — Comparing the North Carolina Rules of Civil Procedure with the Uniform Interstate and International Procedure Act," see 49 N.C.L. Rev. 235 (1971).

**Purpose of Section.**—The broad purpose of this section is to enable a resident motorist to bring a nonresident motorist, who would otherwise be beyond this jurisdiction by the time suit could be instituted, within the jurisdiction of our courts to answer for a negligent injury inflicted while the nonresident was using the highways of this State. *Hart v. Queen City Coach Co.*, 241 N.C. 389, 85 S.E.2d 319 (1955).

The evident purpose of this section is to extend the State's judicial power broadly to permit North Carolina residents to acquire jurisdiction over nonresidents who may be held responsible for injuries or death caused by their automobiles. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

This section is constitutional and valid. *Bigham v. Foor*, 201 N.C. 14, 158 S.E. 548 (1931); *Wynn v. Robinson*, 216 N.C. 347, 4 S.E.2d 884 (1939); *Davis v. Martini*, 233 N.C. 351, 64 S.E.2d 1 (1951); *Ewing v. Thompson*, 233 N.C. 564, 65 S.E.2d 17 (1951).

The fundamental requisites of due process are notice and opportunity to be heard, both of which are adequately provided for by this section. *Denton v. Ellis*, 258 F. Supp. 223 (E.D.N.C. 1966).

This section has been considered against a constitutional background and upheld as giving adequate notice to the defendant and as a reasonable exercise of jurisdiction. *Denton v. Ellis*, 258 F. Supp. 223 (E.D.N.C. 1966).

A state may, in the exercise of its po-

lice power, provide that a nonresident motorist using its highways shall be deemed to have appointed a state official his agent to receive service of process in any action growing out of such use, if the statute provides a proper method for notifying the defendant of such service. *Denton v. Ellis*, 258 F. Supp. 223 (E.D.N.C. 1966).

**Section Not Retroactive.**—This section, providing that a nonresident by using the highways of the State, will be deemed to have appointed the Commissioner of Revenue as his agent for the service of process, is not remedial or curative, but affects a substantial right, and the appointment of the Commissioner thereunder is contractual, and the statute is not to be given retroactive effect, and service of process thereunder in an action accruing before the effective force of the statute is void. *Ashley v. Brown*, 198 N.C. 369, 151 S.E. 725 (1930).

**Section Strictly Construed.**—Substituted or constructive service of process is a radical departure from the rule of the common law, and therefore statutes authorizing it must be strictly construed both as to the proper grant of authority for such service and in determining whether effective service under the statute has been made. *Coble v. Brown*, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

A narrow interpretation of this section would defeat its purpose. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

**But Strict Compliance Is Required.** — The provisions of this section are in derogation of the common law and must be strictly complied with. *Carolina Plywood Distribs., Inc. v. McAndrews*, 270 N.C. 91, 153 S.E.2d 770 (1967).

This section does not in any way change or amend the law governing the commencement of actions or the contents of a summons. *Carolina Plywood Distribs., Inc. v. McAndrews*, 270 N.C. 91, 153 S.E.2d 770 (1967).

**It Provides Artificial Method of Serving Process.**—This section provides a statutory and artificial method by which duly issued process may be served on nonresident motorists. *Carolina Plywood Distribs., Inc. v. McAndrews*, 270 N.C. 91, 153 S.E.2d 770 (1967).

The issuance of a valid summons is necessary for there to be compliance with the provisions of this section. *Carolina Ply-*



wood Distribs., Inc. v. McAndrews, 270 N.C. 91, 153 S.E.2d 770 (1967).

**Statutes in Pari Materia.**—Sections 20-22, 20-37, 20-38 and 20-78, dealing with the privilege and responsibilities of persons operating motor vehicles on the public highways of the State, and this section relating to service of process on a nonresident who has committed a tort in the operation of a vehicle on the public highways of the State, are dealing with the same subject matter and must be considered in *pari materia*. *Morrissey v. Crabtree*, 143 F. Supp. 105 (M.D.N.C. 1956).

**This section and former § 1-89, relating to contents and return of summons, were to be construed together** and the provisions of both strictly complied with. *Carolina Plywood Distribs., Inc. v. McAndrews*, 270 N.C. 91, 153 S.E.2d 770 (1967). As to summons, see now Rule 4 of the Rules of Civil Procedure (§ 1A-1).

**Essential Meaning of This Section and § 20-71.1 the Same.**—Despite differences in the wording of this section and § 20-71.1, the essential meaning is the same. This section requires an affirmative finding as to agency, and § 20-71.1 establishes the rule that proof of ownership is *prima facie* evidence of such agency. *Howard v. Sasso*, 253 N.C. 185, 116 S.E.2d 341 (1960).

**This section does not warrant service upon a nonresident owner in an action for abuse of process** based upon such owner's arrest of plaintiff after a collision between their cars in this State, since the action for abuse of process does not arise out of a collision in which defendant was involved by reason of the operation of his automobile in this State. *Lindsay v. Short*, 210 N.C. 287, 186 S.E. 239 (1936).

**Section Applies to Action on Judgment Entered in Another State.**—This section applies to an action against an alleged joint tort-feasor based upon judgments entered in courts of other states, arising from an accident in this State. *Carolina Coach Co. v. Cox*, 337 F.2d 101 (4th Cir. 1964).

**Nonresident wife living with her husband in another state may serve summons on him by service on Commissioner of Revenue** in her action instituted in a county in this State, to recover for injuries sustained in an automobile accident which occurred in this State and which resulted from his alleged negligence. *Alberts v. Alberts*, 217 N.C. 443, 8 S.E.2d 523 (1940).

Where plaintiff is the wife of defendant, both are nonresidents, and the action was instituted to recover for injuries sustained by plaintiff in an automobile accident which occurred in this State, service of

process on defendant by service on the Commissioner of Revenue under the provisions of this section is valid. *Bogen v. Bogen*, 219 N.C. 51, 12 S.E.2d 649 (1941).

**Section 1-105.1 makes this section applicable to residents of the State who leave and remain without the State subsequent to an accident.** *Denton v. Ellis*, 258 F. Supp. 223 (E.D.N.C. 1966).

Before the enactment of § 1-105.1, the method of serving process on a nonresident provided in this section and former § 1-106 was ineffective to obtain service of process on a citizen and resident of this State while such citizen was residing temporarily outside the State, or was in the armed services of the United States and stationed in another state or foreign country. *Foster v. Holt*, 237 N.C. 495, 75 S.E.2d 319 (1953).

**To sustain service of process upon defendant under this section and § 1-105.1, the plaintiffs must show one of two circumstances;** Either: (1) That defendant had established a residence outside the State subsequent to the accident or collision, or (2) that he had left the State subsequent to the collision complained of and remained absent from the State for sixty days or more continuously. *Coble v. Brown*, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

**Residence of defendant at time of accident controlled the application of this section,** § 1-105.1 and former § 1-107 under federal Rule 4 (d) 7. *Denton v. Ellis*, 258 F. Supp. 223 (E.D.N.C. 1966).

**Affidavit Insufficient to Support Service under this Section and § 1-105.1.**—

Where plaintiffs' affidavits, stripped of incompetent evidence, are left with the statement of the deputy sheriff that he went to defendant's last-known address on two occasions and defendant was not there and that he made further investigations and could not locate the whereabouts of defendant, conceding, for the purpose of argument only, that this might be held sufficient to support an averment of due diligence under the requirements of former § 1-98.2, it is insufficient to make out a *prima facie* case to support service of process under this section and § 1-105.1. *Coble v. Brown*, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

**Resident of Canada Is "Nonresident".**—A resident of Canada, operator of an automobile involved in an accident on a public highway in this State, is a "nonresident" within the purview of this section. *Ewing v. Thompson*, 233 N.C. 564, 65 S.E.2d 17 (1951).



**Member of Armed Services Stationed Here under Military Orders.** — The evidence tended to show that a member of the armed services, accompanied by his wife, was stationed in this State under military orders at the time of the accident in suit, that prior to his entry into service he was a resident of another state, and that at the time of the service of summons both had moved to another state incident to his orders, without evidence that they were in this State for any purpose other than that contemplated by his military service or that they ever formed any intention of making this State their place of residence, is held sufficient to support the trial court's finding of fact that at the time of the accident they were nonresidents so as to subject them to service of summons under this section. *Hart v. Queen City Coach Co.*, 241 N.C. 389, 85 S.E.2d 319 (1955).

**1953 Amendment Authorized Service on Personal Representative of Deceased Non-resident.** — The 1953 amendment to this section authorizes service of process on and the maintenance of an action against a foreign administrator of a nonresident driver fatally injured in a collision in this State to recover for the alleged negligent operation of the vehicle by the nonresident. *Franklin v. Standard Cellulose Prods., Inc.*, 261 N.C. 626, 135 S.E.2d 655 (1964).

Before the 1953 amendment, this section made no provision for service on the personal representative of a deceased automobile owner who died after an accident occurring in this State and before service of process, and service under the statute upon such personal representative conferred no jurisdiction on our courts, since an agency, unless coupled with an interest, is terminated by the death of the principal. *Dowling v. Winters*, 208 N.C. 521, 181 S.E. 751 (1935).

This section clearly permits nonresident administrators to be sued in the State, in actions "growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle [anywhere within the State]." *Tolson v. Hodge*, 411 F.2d 123 (4th Cir. 1969).

For comment on the 1953 amendment, see 31 N.C.L. Rev. 395.

**Purpose and Scope of 1953 Amendment.** — Except for changes in respect of the manner of service, it seems clear that the authorization of an action and service of process upon nonresident drivers of motor vehicles and upon the personal representatives of deceased nonresident drivers of motor vehicles was the only purpose and

significant effect of the 1953 amendment. *Franklin v. Standard Cellulose Prods., Inc.*, 261 N.C. 626, 135 S.E.2d 655 (1964).

**The overwhelming weight of authority sustains the assertion of jurisdiction over personal representatives of nonresident motorists.** *Tolson v. Hodge*, 411 F.2d 123 (4th Cir. 1969).

While North Carolina, by virtue of this section, permits a suit against the nonresident administrator of a motorist who became involved in an auto accident in North Carolina, nonresident administrators are otherwise held to lack the capacity to sue or be sued. However, the argument that the lack of capacity to initiate suit, while having capacity to be sued, renders a statute like this section "grossly unfair" has been specifically rejected. *Tolson v. Hodge*, 411 F.2d 123 (4th Cir. 1969).

**Counterclaim by Personal Representative.** — Once a federal district court properly exercises jurisdiction to determine a cause of action, such procedural matters as the assertion of counterclaims should be governed by the specific federal rules pertaining thereto without further reference to state law. *Tolson v. Hodge*, 411 F.2d 123 (4th Cir. 1969), holding that the federal district court correctly decided that a foreign personal representative could assert a counterclaim in an action in that court wherein service was had under this section.

**An action authorized by this section as amended in 1953 is an exception to the general rule stated in Cannon v. Cannon**, 228 N.C. 211, 45 S.E.2d 34 (1947). *Franklin v. Standard Cellulose Prods., Inc.*, 261 N.C. 626, 135 S.E.2d 655 (1964).

**Public Highways Include Public Streets.** — When the legislature authorized the service of process on a nonresident in an action for damages growing out of an accident occurring on the public highways of North Carolina, it covered accidents on public streets as well as public roads, for both are public highways. *Morrissey v. Crabtree*, 143 F. Supp. 105 (M.D.N.C. 1956).

**The legislature, in the 1955 amendment, intended only to broaden the area of vehicular operation to include private ways and places on land not within the confines of public highways.** *Byrd v. Piedmont Aviation, Inc.*, 256 N.C. 684, 124 S.E.2d 880 (1962).

For brief comment on the 1955 amendment, see 33 N.C.L. Rev. 530.

**It did not intend to enlarge and extend the meaning of the words "motor vehicle."** The 1955 amendment does not undertake to change the type of vehicle, but merely



enlarges the sphere of its operation. *Byrd v. Piedmont Aviation, Inc.*, 256 N.C. 684, 124 S.E.2d 880 (1962).

**Which Involves Only Motor-Driven Devices Used in Travel by Land.**—The ordinary, popular and common acceptance of the term "motor vehicle" has no relation to machines used in travel by air; it involves only motor-driven devices used in travel by land. *Byrd v. Piedmont Aviation, Inc.*, 256 N.C. 684, 124 S.E.2d 880 (1962).

**An airplane is not a "motor vehicle"** within the purview of this section. *Byrd v. Piedmont Aviation, Inc.*, 256 N.C. 684, 124 S.E.2d 880 (1962).

**State May Assert Jurisdiction over Owner as Well as Driver.**—The State has a strong interest in being able to provide a convenient forum where its citizens may be able to seek, from the owner as well as from the actual operator, compensation for injuries that will often be extremely serious. Jurisdiction over the driver who inflicted the injury does not exhaust the State's interest; it is not pushing the matter too far to recognize that the State may also assert the jurisdiction of its courts over the owner who placed the vehicle in the driver's hands to take it onto the State's highways. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

Ownership of property, particularly that which is capable of inflicting serious injury, may fairly be coupled with an obligation upon the owner to stand suit where the property is or has been taken with his consent. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

**But Neither Ownership nor Physical Presence Is Necessary.** — By the express language of this section, the operation of a motor vehicle by a nonresident on the highways is the equivalent of the appointment of the Commissioner of Motor Vehicles as process agent for the nonresident. Neither ownership nor physical presence in the motor vehicle is necessary for valid service. It is sufficient if the nonresident had the legal right to exercise control at the moment the asserted cause of action arose. *Pressley v. Turner*, 249 N.C. 102, 105 S.E.2d 289 (1958).

Under this section, the ownership or lack of ownership by the nonresident defendant of the motor vehicle involved in the accident is of no legal consequence insofar as his amenability to constructive service of process is concerned. *Davis v. Martini*, 233 N.C. 351, 64 S.E.2d 1 (1951).

**Car Must Be Operated by, for or under Direction or Control of Nonresident De-**

**fendant.**—This section provides for constructive service of process upon a nonresident defendant in either of the following situations: 1. Where the nonresident was personally operating the vehicle. 2. Where the vehicle was being operated for the nonresident, or under his control or direction, express or implied. *Davis v. Martini*, 233 N.C. 351, 64 S.E.2d 1 (1951).

To sustain service of process under this section there must be a finding to the effect that the owner's motor vehicle, on the occasion of the collision, was being operated "for him, or under his control or direction." *Howard v. Sasso*, 253 N.C. 185, 116 S.E.2d 341 (1960).

In order to hold an attempted service upon a nonresident valid under this section there must be sufficient evidence to support a finding that the automobile was operated under the "control or direction, express or implied" of the nonresident defendant. *Smith v. Haughton*, 206 N.C. 587, 174 S.E. 506 (1934); *Howard v. Sasso*, 253 N.C. 185, 116 S.E.2d 341 (1960).

An affidavit of a salesman that the details of his schedule and the control of his automobile were determined by him, subject to the approval of his corporate employer, supports the finding of the court that the automobile was being operated for the corporate employer and under its control and direction, express or implied, within the meaning of this section and, in an action to recover for alleged negligent operation of the car, service of process on the corporate employer through the Commissioner of Revenue is valid. *Wynn v. Robinson*, 216 N.C. 347, 4 S.E.2d 884 (1939). See also, *Queen City Coach Co. v. Chattanooga Medicine Co.*, 220 N.C. 442, 17 S.E.2d 478 (1941).

Averments in affidavits that the automobile causing the injury in suit, admittedly owned by the nonresident corporate defendant and driven in this State by its salesman, was being driven here with the corporation's permission for the purpose of effecting a sale, is sufficient evidence to support the court's finding that the automobile was being driven at the time of the injury for the corporation or was under its implied control and direction so as to support service of process on it by service on the Commissioner of Revenue. *Crabtree v. Burroughs-White Chevrolet Sales Co.*, 217 N.C. 587, 9 S.E.2d 23 (1940).

Where a deputy sheriff of the state of South Carolina was traveling through this State to return a prisoner to that state in his own car, which was driven by another whom he engaged to drive the car and to assist in returning the prisoner, it was



held that the deputy sheriff was without authority to designate another to act for the sheriff, and the driver of the car was not operating same for the sheriff and under the sheriff's direction and control within the purview of this section, and therefore service of process on the sheriff by service on the Commissioner of Revenue was void. *Blake v. Allen*, 221 N.C. 445, 20 S.E.2d 552 (1942).

Evidence was sufficient to show control of the motor vehicle by the nonresident defendant. *Davis v. Martini*, 233 N.C. 351, 64 S.E.2d 1 (1951).

**Owner May Be Presumed to Have Right of Control.**—An automobile owner may not unreasonably be presumed to have a right to exercise control. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

**And Unlikelihood that He Will Exercise It Is Immaterial.**—The unlikelihood that the owner will in fact exercise his legal right to control the operation of the automobile is immaterial. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

**Owner Need Not Be Physically in a Position to Direct Driver.**—This section does not require that the owner be physically in a position to direct the driver's every move. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

The words "express or implied" suggest only a minimal connection between the driver and the owner, which is satisfied if the owner has a legal right to control the operation of the automobile. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

**Driver Need Not Be Acting for Pecuniary Benefit of Owner.**—This section does not require that the driver be acting for the pecuniary benefit of the owner. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

The "family purpose" doctrine is not determinative in interpreting this section where "control or direction" are the standards. *Davis v. St. Paul-Mercury Indem. Co.*, 294 F.2d 641 (4th Cir. 1961).

**Family-Purpose Automobile Operated by Son of Owner.**—A family-purpose automobile, owned by a resident of Canada, and operated by her son on a public highway in this State, is operated for the owner, or under her control or direction, express or implied, within the purview of this section. *Ewing v. Thompson*, 233 N.C. 564, 65 S.E.2d 17 (1951).

The summons must command the sheriff or other proper officer to summon the defendant or defendants. *Carolina Ply-*

*wood Distribs., Inc. v. McAndrews*, 270 N.C. 91, 153 S.E.2d 770 (1967).

Where the summons commanded the sheriff to summons the Commissioner of Motor Vehicles only and did not command the sheriff to summons the defendants at all and the Commissioner duly mailed a copy to the nonresident defendants, the nonresidents were not summoned and the court had no jurisdiction in the absence of a general appearance by them. *Carolina Plywood Distribs., Inc. v. McAndrews*, 270 N.C. 91, 153 S.E.2d 770 (1967).

**Meaning of Subdivision (2).**—The provision in subdivision (2) of this section making the defendant's return receipt "sufficient evidence of the date on which notice of service upon the Commissioner of Motor Vehicles and copy of process were delivered to the defendant," does not mean that all that is required to effect service upon a nonresident motorist is the return of a receipt for registered mail signed by the defendant. This provision did not replace the statutory scheme for substituted service; rather, it merely provided a conclusive means of determining when that service had been accomplished. Service is still to be made "by leaving" the process with the Commissioner of Motor Vehicles. *Byrd v. Pawlick*, 362 F.2d 390 (4th Cir. 1966).

Hence, where, apparently through inadvertence, the order for service of process upon a nonresident motorist under this section was directed to the sheriff of one county, but was forwarded by the plaintiff's attorneys to the sheriff of another county and by him served upon the Commissioner of Motor Vehicles, service was insufficient, notwithstanding that notice of service of process upon the Commissioner and a copy thereof did reach the defendant by registered mail as required by subdivision (2) of this section. *Byrd v. Pawlick*, 362 F.2d 390 (4th Cir. 1966).

**What Sheriff's Return Must Show.**—When service of process on a nonresident, through the Commissioner of Motor Vehicles, as provided in this section, is sought, it is essential that the sheriff's return show that such service was made as specifically required, and that a copy of the process be sent defendant by registered mail and return receipt therefor and plaintiff's affidavit of compliance be attached to summons and filed. *Propst v. Hughes Trucking Co.*, 223 N.C. 490, 27 S.E.2d 152 (1943).

**Refusal to Accept Registered Mail.**—A default judgment will not be vacated where nonresident defendants knew plaintiff was injured by a truck owned and



operated by them, and was demanding damages, and they refused to accept registered mail in order to avoid service. *Morrissey v. Crabtree*, 143 F. Supp. 105 (M.D.N.C. 1956).

**Service under Federal Rule.**—If the requirements of this section and § 1-105.1 are met, service under Rule 4 of the federal Rules of Civil Procedure is valid. *Denton v. Ellis*, 258 F. Supp. 223 (E.D.N.C. 1966).

**Amendment of Process and Pleading.**—When the procedural requirements of this section are strictly complied with, the process and pleading are subject to amendment in accordance with general rules. *Carolina Plywood Distribs., Inc. v. McAndrews*, 270 N.C. 91, 153 S.E.2d 770 (1967).

Where service of process on a nonresident motorist is had in strict accordance with the procedural requirements of this section, such process and the pleading is subject to amendment in accordance with the general rules. *Bailey v. McPherson*, 233 N.C. 231, 63 S.E.2d 559 (1951).

**Procedural Error Corrected When Another Summons Served and Returned.**—If the initial service failed to comply with this section, the procedural error is corrected when another summons, dated subsequently, is served and returned as having been served on defendant by leaving a copy with the Commissioner of Motor Vehicles as process agent for defendant. *Tolson v. Hodge*, 411 F.2d 123 (4th Cir. 1969).

**Service Held Sufficient.** — Where the person sought to be sued, personally receives notice by registered mail of summons and complaint giving him unmistakable notice that it was he that was intended to be sued, although the process ran against a nonexistent corporation of the same name as the firm operated by him, it was held that the service in strict accord with this section is sufficient to meet the requirements of due process of law. *Bailey v. McPherson*, 233 N.C. 231, 63 S.E.2d 559 (1951).

Where defendant refused to accept a copy of the complaint and summons, because the word "Jr." was not included after his name, the Supreme Court held that the suffix, "Jr.," is no part of a person's name; it is a mere *descriptio personae*; names are to designate persons, and where the identity is certain a variance in the name is immaterial. *Sink v. Schafer*, 266 N.C. 347, 145 S.E.2d 860 (1966).

**Motion to Quash Service Denied.** — Where, in an action against a nonresident bus owner to recover for the negligent operation of a bus in this State, service on the nonresident was had by service on the

Commissioner of Motor Vehicles, the nonresident's motion to quash the service should be denied when the nonresident offered no evidence in support of its allegations that it had leased the bus to be operated solely by and under the exclusive control of a resident corporation and under the resident corporation's franchise right. *Israel v. Baltimore & A.R.R.*, 262 N.C. 83, 136 S.E.2d 248 (1964).

**Extension of Time to Plead.**—The statutes pertaining to service of process upon a nonresident motorist contemplate giving such a defendant an opportunity to defend even beyond the right of the judge in his discretion to extend the time. *Mills v. McCuen*, 1 N.C. App. 403, 161 S.E.2d 628 (1968).

There is no error where the judge not only found good cause for extending the time to plead on behalf of the defendant but allowed the extension in his discretion, no abuse of discretion has been shown, and there was sufficient evidence below to support the court's finding of sufficient cause. *Mills v. McCuen*, 1 N.C. App. 403, 161 S.E.2d 628 (1968).

**Finding of Nonresidence Conclusive on Appeal.**—The finding of the trial court that defendants were nonresidents on the date of the automobile collision in suit, and were, therefore, subject to service under this section, is conclusive on appeal if such finding is supported by evidence. *Hart v. Queen City Coach Co.*, 241 N.C. 389, 85 S.E.2d 319 (1955).

Upon motion to dismiss an action on the ground that the defendant was a resident of this State and was served with summons under a statute authorizing service on nonresidents, the finding of fact by the superior court judge that the defendant was a nonresident, based upon competent evidence, is conclusive on appeal. *Bigham v. Foor*, 201 N.C. 14, 158 S.E. 548 (1931).

**Findings of Fact Sufficient to Support Service under This Section.** — See *Winborne v. Stokes*, 238 N.C. 414, 78 S.E.2d 171 (1953).

**Applied in** *MacClure v. Accident & Cas. Ins. Co.*, 229 N.C. 305, 49 S.E.2d 742 (1948); *Todd v. Thomas*, 202 F. Supp. 45 (E.D.N.C. 1962).

**Quoted in** *Townsend v. Carolina Coach Co.*, 231 N.C. 81, 56 S.E.2d 39 (1949).

**Cited in** *Howard v. Queen City Coach Co.*, 212 N.C. 201, 193 S.E. 138 (1937); *Hodges v. Home Ins. Co.*, 232 N.C. 475, 61 S.E.2d 372 (1950); *Nationwide Mut. Ins. Co. v. Roberts*, 261 N.C. 285, 134 S.E.2d 654 (1964).



**§ 1-105.1. Service on residents who establish residence outside the State and on residents who depart from the State.**—The provisions of G.S. 1-105 of this Chapter shall also apply to a resident of the State at the time of the accident or collision who establishes residence outside the State subsequent to the accident or collision and to a resident of the State at the time of the accident or collision who departs from the State subsequent to the accident or collision and remains absent therefrom for 60 days or more, continuously whether such absence is intended to be temporary or permanent. (1955, c. 232; 1967, c. 954, s. 4; 1971, c. 420, s. 2.)

**Cross Reference.**—See note to § 1-105.

**Editor's Note.** — This section was repealed, effective Jan. 1, 1970, by Session Laws 1967, c. 954, s. 4.

Session Laws 1971, c. 420, s. 1, effective July 1, 1971, provides: "Section 4 of Chapter 954 of the 1967 Session Laws is hereby amended by deleting G.S. 1-105 and G.S. 1-105.1 from the list of repealed General Statutes sections."

**Section Strictly Construed.**—Substituted or constructive service of process is a radical departure from the rule of the common law, and therefore statutes authorizing it must be strictly construed both as to the proper grant of authority for such service and in determining whether effective service under the statute has been made. *Coble v. Brown*, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

**Domicile in State Brings Defendant within Reach of State's Jurisdiction.** — Domicile in the State is alone sufficient to bring an absent defendant within the reach of the State's jurisdiction for purposes of a personal judgment by means of appropriate substituted service, provided proper notice and opportunity for hearing were given. *Denton v. Ellis*, 258 F. Supp. 223 (E.D.N.C. 1966).

**When Plaintiff Must Show Facts Bringing Defendant within Purview of Section.**

—This section does not require that plaintiffs must set forth in their complaint or by affidavit the facts giving rise to the conclusion that defendant comes within the purview of the statute; nevertheless, upon attack by special appearance and motion to quash, a showing is required of the facts essential to jurisdiction. *Coble v. Brown*, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Upon the defendant's motion to quash the service and dismiss the action, it becomes incumbent upon plaintiffs to present evidence to support the service of process. *Coble v. Brown*, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

**Mere Averment of Due Diligence Is Insufficient.**—A mere averment of due dili-

gence sufficient to support service by publication in an in rem action is not sufficient if the case arises under this section. *Coble v. Brown*, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

Where plaintiffs' affidavits, stripped of incompetent evidence, are left with the statement of the deputy sheriff that he went to defendant's last-known address on two occasions and defendant was not there and that he made further investigations and could not locate the whereabouts of defendant, conceding, for the purpose of argument only, that this might be held sufficient to support an averment of due diligence under the requirements of former § 1-98.2, it is insufficient to make out a prima facie case to support service of process under this section and § 1-105. *Coble v. Brown*, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

**Averment and Affidavit Based on Hearsay.**—Where one plaintiff simply averred that he was "informed and believed" that defendant had removed himself from his last-known address and had left the State and remained absent for more than sixty days continuously subsequent to the collision complained of and was residing somewhere in Florida and the deputy sheriff's affidavit averred that he talked with a woman who he "was informed" and believed was defendant's sister who told him that it was her "information and belief" that defendant was living in Florida and that he was "informed and believes and therefore says" that the only information he was able to obtain concerning the whereabouts of defendant indicated that the said defendant was residing in the state of Florida, address unknown, this evidence is manifestly hearsay evidence, not admissible, and defendant's objection thereto is entirely proper. *Coble v. Brown*, 1 N.C. App. 1, 159 S.E.2d 259 (1968).

**Cited in Nationwide Mut. Ins. Co. v. Roberts**, 261 N.C. 285, 134 S.E.2d 654 (1964); *Harrison v. Hanvey*, 265 N.C. 243, 143 S.E.2d 593 (1965); *Byrd v. Pawlick*, 362 F.2d 390 (4th Cir. 1966).



## ARTICLE 9.

*Prosecution Bonds.*

§ 1-109. **Plaintiff's, for costs.**—At any time after the issuance of summons, the clerk or judge, upon motion of the defendant, shall require the plaintiff to do one of the following things and the failure to comply with such order within 30 days from the date thereof shall constitute grounds for dismissal of such civil action or special proceeding:

- (3) File with him a written authority from a superior or district court judge or clerk of a superior court, authorizing the plaintiff to sue as a pauper: Provided, however, that the requirements of this section shall not apply to the State of North Carolina or any of its agencies, commissions or institutions, or to counties, drainage districts, cities and towns; provided, further, that the State of North Carolina or any of its agencies, commissions or institutions, and counties, drainage districts, cities and towns may institute civil actions and special proceedings without being required to give a prosecution bond or make deposit in lieu of bond. (R. C., c. 31, s. 40; C. C. P., s. 71; Code, s. 209; Rev., s. 450; C. S., s. 493; 1935, c. 398; 1949, c. 53; 1955, c. 10, s. 1; 1957, c. 563; 1961, c. 989; 1971, c. 268, s. 3.)

**Editor's Note.**—The 1971 amendment, effective July 1, 1971, inserted "superior or district court" near the beginning of subdivision (3).

Only the opening paragraph of the section and the subdivision changed by the amendment are set out.

§ 1-110. **Suit as a pauper; counsel.**—Any superior or district court judge or clerk of the superior court may authorize a person to sue as a pauper in their respective courts when he proves, by one or more witnesses, that he has a good cause of action, and makes affidavit that he is unable to comply with the provisions of G.S. 1-109. The court to which such summons is returnable may assign to the person suing as a pauper learned counsel, who shall prosecute his action. (C. C. P., s. 72; 1868-9, c. 96, s. 2; Code, ss. 210, 211; Rev., ss. 451, 452; C. S., s. 494; 1971, c. 268, s. 4.)

**Editor's Note.**—The 1971 amendment, effective July 1, 1971, inserted "superior or district court" near the beginning of the

first sentence and substituted, at the end of that sentence, "provisions of G.S. 1-109" for "preceding section [§ 1-109]."

§ 1-111. **Defendant's, for costs and damages in actions for land.**

The defense bond required by this section is not an "appeal bond" but is a bond which can be required before defendant is allowed to plead to the complaint. *Crockett v. Lowry*, 8 N.C. App. 71, 173 S.E.2d 566 (1970).

**Failure to Give Undertaking—When No Objection Made.—**

In cases coming within the purview of this section, when an answer has been filed without any bond and has remained on file without objection, it would be improper for

the trial judge to strike the answer and render judgment for plaintiff without notice to show cause or without giving the defendant the opportunity to file a defense bond. *Crockett v. Lowry*, 8 N.C. App. 71, 173 S.E.2d 566 (1970).

**Failure to Give Undertaking—Waiver.—**

The requirement that the defendant must execute and file a defense bond may be waived, unless seasonably insisted upon by the plaintiff. *Crockett v. Lowry*, 8 N.C. App. 71, 173 S.E.2d 566 (1970).

## SUBCHAPTER VI. PLEADINGS.

## ARTICLE 15.

*Answer.*

## § 1-139. Burden of proof of contributory negligence.

**Contributory Negligence Must Be Set Up in Answer and Proved.**—In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and defendant must assume the burden of proving his allegation of contributory negligence. *Stith v. Perdue*, 7 N.C. App. 314, 172 S.E.2d 246 (1970).

One relying on contributory negligence must prove facts from which the inference of contributory negligence may be drawn by men of ordinary reason. *Tharpe v. Brewer*, 7 N.C. App. 432, 172 S.E.2d 919 (1970).

**Sufficiency of Plea.**—To be sufficient, a

plea of contributory negligence must aver a state of facts to which the law attaches negligence as a conclusion. *Tharpe v. Brewer*, 7 N.C. App. 432, 172 S.E.2d 919 (1970).

A motion for judgment of compulsory nonsuit upon the ground of contributory negligence should be allowed only when the plaintiff's evidence, considered alone and taken in the light most favorable to him, together with inferences favorable to him which may be reasonably drawn therefrom, so clearly establishes the defense of contributory negligence that no other conclusion can reasonably be drawn. *Stith v. Perdue*, 7 N.C. App. 314, 172 S.E.2d 246 (1970).

## ARTICLE 17.

*Pleadings, General Provisions.*

§ 1-148. **Verification before what officer.**—Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the General Court of Justice, notary public, in or out of the State, or magistrate, is competent to take affidavits for the verification of pleadings, in any court or county in the State, and for general purposes. (C. C. P., s. 117; 1868-9, c. 159, s. 7; Code, s. 258; 1891, c. 140; Rev., s. 492; C. S., s. 532; 1971, c. 268, s. 5.)

**Editor's Note.**—

The 1971 amendment, effective July 1, 1971, substituted "General Court of Jus-

stice" for "superior court" and "magistrate" for "justice of the peace."

## SUBCHAPTER VII. PRETRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

## ARTICLE 19.

*Trial.*

§ 1-174. **Issues of fact before the clerk.**—All issues of fact joined before the clerk shall be transferred to the superior court for trial at the next succeeding session, and in case of such transfer neither party is required to give an undertaking for costs. (Rev., s. 529; C. S., s. 558; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term."

## § 1-180. Judge to explain law, but give no opinion on facts.

## I. IN GENERAL.

**Editor's Note.**—

For comment on North Carolina jury charge, present practice and future pro-

posals, see 6 Wake Forest Intra. L. Rev. 459 (1970).

This section is now applicable only to criminal cases. Civil cases are governed by



Rule 51 (a) of the Rules of Civil Procedure (§ 1A-1), which incorporates the substance of the section. *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970).

**Strict Observance of Section's Provisions Required.**—The Supreme Court of North Carolina has consistently endeavored to maintain the integrity of this section by requiring strict observance of its provisions. *State v. Lee*, 277 N.C. 205, 176 S.E.2d 765 (1970).

**The provisions of this section, etc.—**

This section is mandatory and a violation of it is prejudicial error. *State v. Lee*, 277 N.C. 205, 176 S.E.2d 765 (1970).

**If the mandatory requirements of this section are not observed, there can be no assurance that the verdict represents a finding by the jury under the law and the evidence presented.** *Wood v. Nelson*, 5 N.C. App. 407, 168 S.E.2d 712 (1970).

**Section Not Applicable to Hearing Where No Jury Is Present.**—The provisions of this section prohibiting a court from giving an opinion on the evidence in the presence of the jury are obviously not applicable in a hearing where no jury is present. *State v. Butcher*, 10 N.C. App. 93, 177 S.E.2d 924 (1970).

**Applied in** *State v. Virgil*, 276 N.C. 217, 172 S.E.2d 28 (1970); *Lentz v. Lentz*, 5 N.C. App. 309, 168 S.E.2d 437 (1969); *State v. Letterlough*, 6 N.C. App. 36, 169 S.E.2d 269 (1969); *State v. Blackmon*, 6 N.C. App. 66, 169 S.E.2d 472 (1969); *State v. Lightsey*, 6 N.C. App. 745, 171 S.E.2d 27 (1969); *State v. Ealy*, 7 N.C. App. 42, 171 S.E.2d 24 (1969); *State v. Locklear*, 7 N.C. App. 493, 172 S.E.2d 924 (1970); *State v. Barker*, 8 N.C. App. 311, 174 S.E.2d 88 (1970); *State v. Locklear*, 8 N.C. App. 535, 174 S.E.2d 641 (1970); *State v. Batts*, 8 N.C. App. 551, 174 S.E.2d 704 (1970); *State v. Korn*, 10 N.C. App. 187, 178 S.E.2d 9 (1970); *State v. Council*, 10 N.C. App. 190, 177 S.E.2d 738 (1970); *State v. Colson*, 11 N.C. App. 436, 181 S.E.2d 211 (1971); *State v. Powell*, 277 N.C. 672, 178 S.E.2d 417 (1971).

**Quoted in** *State v. Jacobs*, 278 N.C. 693, 180 S.E.2d 832 (1971).

**Cited in** *State v. Haith*, 7 N.C. App. 552, 172 S.E.2d 912 (1970); *State v. Powell*, 11 N.C. App. 465, 181 S.E.2d 754 (1971); *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

## II. OPINION OF JUDGE.

### A. General Consideration.

#### Purposes and Effect of Section.—

In accord with 9th paragraph in original.

See *State v. Frazier*, 278 N.C. 458, 180 S.E.2d 128 (1971).

Defendants are entitled to have a case presented to the jurors without their being subjected to the opinion of a trial judge upon what the facts of the case are or what the verdict should be. *Voorhees v. Guthrie*, 9 N.C. App. 266, 175 S.E.2d 614 (1970).

A court's expressions of opinion are particularly harmful if they include assumptions of evidence entirely unsupported by the record. *State v. Stroud*, 10 N.C. App. 30, 177 S.E.2d 912 (1970).

When remarks from the bench tend to belittle and humiliate counsel, defendant's case can be seriously prejudiced in the eyes of the jury. *State v. Frazier*, 278 N.C. 458, 180 S.E.2d 128 (1971).

Any opinion or intimation of the judge at any time during the trial which prejudices a litigant in the eyes of the jury is reversible error. *State v. Atkinson*, 278 N.C. 168, 179 S.E.2d 410 (1971).

This section imposes on the trial judge the duty of absolute impartiality. *State v. Frazier*, 278 N.C. 458, 180 S.E.2d 128 (1971).

It is the duty of the trial judge at all times to be absolutely impartial. *State v. Atkinson*, 278 N.C. 168, 179 S.E.2d 410 (1971).

Every person charged with crime has an absolute right to a fair trial before an impartial judge and an unprejudiced jury in an atmosphere of judicial calm. To accord this right the trial judge must abstain from conduct or language which tends to discredit or prejudice the accused or his cause with the jury. *State v. Cox*, 6 N.C. App. 18, 169 S.E.2d 134 (1969).

**Judge to Abstain from Prejudicial Conduct or Language.**—The judge must abstain from conduct or language which tends to prejudice the accused or his cause with the jury. *State v. Atkinson*, 278 N.C. 168, 179 S.E.2d 410 (1971).

#### This section forbids the judge, etc.—

In accord with 1st paragraph in original. See *State v. Frazier*, 278 N.C. 458, 180 S.E.2d 128 (1971); *State v. Atkinson*, 278 N.C. 168, 179 S.E.2d 410 (1971).

In accord with 2nd paragraph in original. See *State v. Frazier*, 278 N.C. 458, 180 S.E.2d 128 (1971).

In accord with 8th paragraph in original. See *State v. Hall*, 11 N.C. App. 410, 181 S.E.2d 240 (1971).

The trial judge is expressly forbidden to convey to the jury, in any manner, at any stage of the trial, his opinion as to whether a fact is fully or sufficiently proven. *State*



v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969).

The judge may not make a statement or ask a defendant or a witness questions tending to impeach him or to cast doubt on his credibility or which intimate that a fact has or has not been established. State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

#### **Section Not Confined to Charge.—**

In accord with 3rd paragraph in original. See State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969).

This section applies not only to the charge of the court, but also prohibits the court at a jury trial from expressing an opinion on the evidence or the veracity of the witnesses at any time during the trial in any manner, or in any form, by word of mouth or by action, and prohibits the trial judge from asking questions or making comments at any time during the trial which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness. State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 138 (1970).

#### **Motive of Judge Immaterial.—**

In accord with 2nd paragraph in original. See State v. Byrd, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

#### **Inadvertent Expression, etc.—**

The fact that the expression of opinion was unintentional or inadvertent does not make it less prejudicial. State v. Hall, 11 N.C. App. 410, 181 S.E.2d 240 (1971).

Where trial court inadvertently expressed his opinion in stating the contentions of the parties, the cause must be remanded for a new trial. Voorhees v. Guthrie, 9 N.C. App. 266, 175 S.E.2d 614 (1970).

#### **Harmless Error.—**

In accord with original. See State v. Huffman, 7 N.C. App. 92, 170 S.E.2d 561 (1969).

#### **Unsupported Assumption of Evidence Is Prejudicial Despite Untimely Objection.—**

While ordinarily error in stating contentions of the parties must be brought to the trial court's attention in time to afford opportunity for correction, where the misstatement of a contention upon a material point includes an assumption of evidence entirely unsupported by the record, the misstatement must be held prejudicial, notwithstanding the absence of timely objection. State v. Stroud, 10 N.C. App. 30, 177 S.E.2d 912 (1970).

#### **Credibility of Witnesses, etc.—**

The credibility of the witnesses and conflicts in the evidence are for the jury, not the court. Atkins v. Moye, 277 N.C. 179, 176 S.E.2d 789 (1970).

The criterion for determining whether the trial judge deprived an accused of his right to a fair trial by improper comments or remarks in the hearing of the jury is the probable effect upon the jury. In applying this test, the utterance of the judge is to be considered in the light of the circumstances under which it was made. State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969).

#### **B. What Constitutes an Opinion.**

##### **Taking Witness into Custody in Presence of Jury.—**

If a witness is taken into custody during the course of the trial under such circumstances as to lead the jury to the conclusion that the judge was of the opinion that the witness was guilty of perjury, such action constitutes prejudicial error as being an expression of opinion by the court as to the credibility of the witness. State v. Garrett, 5 N.C. App. 367, 168 S.E.2d 479 (1969).

##### **Taking Witness into Custody Out of Presence of Jury.—**

The fact that the trial court ordered a State's witness to be taken into custody and charged with perjury does not constitute an expression of opinion to the prejudice of defendants in violation of this section when the trial court's action took place out of the presence of the jury. State v. Garrett, 5 N.C. App. 367, 168 S.E.2d 479 (1969).

Admonitions of the court to counsel upon improper questioning of witnesses have repeatedly been held not prejudicial. State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969).

A remark by the court in admitting or excluding evidence is not prejudicial when it amounts to no more than a ruling on the question or where it is made to expedite the trial. State v. Cox, 6 N.C. App. 18, 169 S.E.2d 134 (1969).

**Control of Examination and Cross-Examination.—**It is both the right and the duty of the presiding judge to control the examination and cross-examination of witnesses, both for the purpose of conserving the time of the court, and for the purpose of protecting the witness from prolonged and needless examination, but in doing so the court must not intimate any opinion either of the witness or his credibility. State v. Frazier, 278 N.C. 458, 180 S.E.2d 128 (1971).

##### **Intimation That Controverted Facts, etc.—**

In accord with original. See State v. Brinkley, 10 N.C. App. 160, 177 S.E.2d 727 (1970).

##### **Assumption That Fact, etc.—**

In accord with 1st paragraph of original.



See *State v. Hall*, 11 N.C. App. 410, 181 S.E.2d 240 (1971); *State v. Brinkley*, 10 N.C. App. 160, 177 S.E.2d 727 (1970).

**Remarks Must Be Prejudicial.—**

Remarks of the court during a trial will not entitle a defendant to a new trial unless they tend to prejudice the defendant. *State v. Byrd*, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

**Credibility of Witnesses.—**

This section prohibits any ridicule that casts aspersions on the testimony of a witness and thus damages his credibility. *State v. Frazier*, 278 N.C. 458, 180 S.E.2d 128 (1971).

**Time Spent in Outlining Evidence, etc.—**

The fact that the trial court necessarily consumed more time in outlining the evidence for the State than that of the defendant did not support defendant's contention that the court expressed an opinion upon the facts by laying undue emphasis on the contentions of the State. *State v. Crutchfield*, 5 N.C. App. 586, 169 S.E.2d 43 (1969).

A charge which reviews the State's evidence cannot be held erroneous as an expression of opinion that certain facts were fully proven when it appears that the court categorically indicated to the jury it was reviewing the State's evidence. *State v. Rennick*, 8 N.C. App. 270, 174 S.E.2d 122 (1970).

**Questioning Witness.—**

It has been the immemorial custom for the trial judge to examine witnesses who are tendered by either side whenever he sees fit to do so, but the law requires such examinations to be conducted with care and in a manner which avoids prejudice to either party. *State v. Frazier*, 278 N.C. 458, 180 S.E.2d 128 (1971).

It is proper for the court to ask a witness questions for the purpose of clarifying the witness' testimony, but in so doing the court should be careful not to express an opinion on the facts or impeach or discredit the witness. *State v. Byrd*, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

A trial judge may ask questions of a witness in order to obtain a proper understanding and clarification of the witness' testimony. *State v. Blalock*, 9 N.C. App. 94, 175 S.E.2d 716 (1970).

It is proper, and often necessary, that judges ask questions of witnesses which are designed to obtain a proper understanding and clarification of the witnesses' testimony. *State v. Rennick*, 8 N.C. App. 270, 174 S.E.2d 122 (1970).

A trial judge is justified in propounding competent questions in order to develop

some relevant fact. *State v. Huffman*, 7 N.C. App. 92, 171 S.E.2d 339 (1969).

It is not improper for the court to ask questions for the purpose of obtaining a proper understanding and clarification of a witness' testimony as long as the trial judge does not engage in frequent interruptions and prolonged questioning. *State v. Huffman*, 7 N.C. App. 92, 171 S.E.2d 339 (1969).

If by their tenor, their frequency, or by the persistence of the trial judge they tend to convey to the jury in any manner at any stage of the trial the impression of judicial leaning, examinations of witnesses by the judge violate the purpose and intent of this section and constitute prejudicial error. *State v. Frazier*, 278 N.C. 458, 180 S.E.2d 128 (1971).

In accord with 4th paragraph in original. See *State v. Blalock*, 9 N.C. App. 94, 175 S.E.2d 716 (1970).

The statutory proscription against the trial judge expressing an opinion prohibits the court from asking questions at any time during the trial which amount to an expression of opinion as to what has or has not been shown by the testimony of a witness. *State v. Huffman*, 7 N.C. App. 92, 171 S.E.2d 339 (1969).

**Test for Determining Prejudice.—**

The question of whether prejudice resulted is to be considered in the light of the circumstances under which the remarks were made. *State v. Byrd*, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

**C. Illustrative Cases.**

**1. Remarks Held Not Erroneous.**

**a. Remarks Concerning a Party to the Trial.**

**Colloquy Whether Defendant Ought to Be Incarcerated Overnight.**—Colloquy between the trial court and the defense counsel in which the court stated, as the jury was leaving the courtroom, that the defendant ought to be kept in jail overnight, and in which the court also stated, in the absence of the jury, that the defendant "has got more reason to run now than he ever had," is not prejudicial. *State v. Wood*, 9 N.C. App. 706, 177 S.E.2d 449 (1970).

**d. Miscellaneous Remarks.**

**Informing Jury That Manslaughter Does Not Arise from Evidence.**—It is not an expression of opinion, but rather the duty of the trial judge, where the evidence so warrants, to inform the jury that manslaughter does not arise on the evidence



in the case. *State v. Duboise*, 279 N.C. 73, 181 S.E.2d 393 (1971).

**Unqualified Use of "Assault" and "Rape".** — The charge, when read as a whole, did not show that the judge in any manner expressed any opinion in violation of this section by the unqualified use of the words "assault" and "rape" or "raping" in referring to the charges against the defendants and the use of these words, did not lead the jury to assume that the facts in controversy had been established. *State v. Blalock*, 9 N.C. App. 94, 175 S.E.2d 716 (1970).

**Reading Warrant.**—In a drunken driving prosecution, the trial court did not express an opinion by the statement in the instructions that "the offense charged here was committed against the peace and dignity of the State" where the court was reading the warrant upon which the defendant was being tried. *State v. Rennick*, 8 N.C. App. 270, 174 S.E.2d 122 (1970).

**Instruction as to Voluntary Flight of Defendant.** — The trial court's instruction that the voluntary flight of a defendant immediately after he is accused of a crime is not a circumstance sufficient in itself to establish his guilt, is not an expression of opinion, on the theory that the court implied to the jury that defendant had been formally charged with crime at the time of his flight from a deputy sheriff's car, when in fact the deputy had told defendant that he wanted to talk to him concerning a robbery. *State v. Kirby*, 7 N.C. App. 366, 172 S.E.2d 93 (1970).

**Inquiry as to Specific Amount of Damages Jury Intended to Award.**—Where the jury answered the issue of damages as "amount specified in contract," and the trial judge informed the jury that the verdict should be in some dollar amount and inquired if they intended the amount set forth in the complaint, and all members of the jury agreed to that amount, the judge did not suggest an answer in violation of this section. *Roberts Co. v. Aladdin Knit Mills, Inc.*, 8 N.C. App. 612, 174 S.E.2d 289 (1970).

## 2. Remarks Held Erroneous.

### a. Remarks Concerning a Party to the Trial.

**Instruction Where Defendants Pleaded Not Guilty and Made No Judicial Admission.**—Where defendants entered pleas of not guilty to charges of armed robbery and there is nothing in the record to show that they made any judicial admission that the offense had actually occurred, a trial court's instruction to the jury that defen-

dants "do not deny that somebody did this, but they say they are not the men, and some other men did it, not themselves," is an unauthorized expression of opinion on the evidence in violation of this section. *State v. Brinkley*, 10 N.C. App. 160, 177 S.E.2d 727 (1970).

**Parties as Witnesses.** — A judge expressed an opinion as to the credibility and probative value of the defendant's testimony when he said to the defendant, in the presence of the jury, that if he (the judge) "had some witnesses who saw what you say they saw, I would have them here." *State v. Byrd*, 10 N.C. App. 56, 177 S.E.2d 738 (1970).

### c. Remarks Concerning Weight and Credibility of Testimony.

**Argument Repeated by Court as Contention.**—An argument that would be permissible when made by the solicitor *may*, when repeated by the court as a contention, give emphasis that would weigh too heavily upon defendant, and would constitute a prejudicial charge under this section. *State v. Stroud*, 10 N.C. App. 30, 177 S.E.2d 912 (1970).

### d. Miscellaneous Remarks.

**Expressions by Judge Stated as Contentions May Violate Section.** — Where expressions by the trial judge, in their warmth and vigor, though stated in the form of contentions, are capable of impressing the jury with the strength of the State's case and the weakness of the alibi of the defendant, such expressions, though unintended by the trial judge to prejudice anyone, are in violation of this section and constitute prejudicial error. *State v. Stroud*, 10 N.C. App. 30, 177 S.E.2d 912 (1970).

**Recapitulation of Testimony and Stating State's Contentions Violated Prohibitions of Section.** — In recapitulating the testimony and, more grievously, in stating what was said to be the State's contentions, the judge violated the prohibition against expressing an opinion on the evidence and merits of the case. Such expressions of opinion entitle the defendant to a new trial. *State v. Hall*, 11 N.C. App. 410, 181 S.E.2d 240 (1971).

## III. EXPLANATION OF LAW AND EVIDENCE.

### A. General Consideration of the Charge.

#### The Object of Instructions.—

The chief purpose of a charge is to aid the jury clearly to comprehend the case, and to arrive at a correct verdict. For this reason, the Supreme Court has consistently



ruled that this section imposes upon the trial judge the positive duty of instructing the jury as to the law upon all of the substantial features of the case. *Wood v. Nelson*, 5 N.C. App. 407, 168 S.E.2d 712 (1969).

**Charge Must Be Considered, etc.—**

The charge of the court must be read as a whole, in the same connected way that the judge is supposed to have intended it and the jury to have considered it. *State v. Lee*, 277 N.C. 205, 176 S.E.2d 765 (1970).

The judge's words in a charge may not be detached from the context and the incidents of the trial and then critically examined for an interpretation from which erroneous expressions may be inferred. *State v. McWilliams*, 277 N.C. 680, 178 S.E.2d 476 (1971).

It is not sufficient to show that a critical examination of the judge's words, detached from the context and the incidents of the trial, are capable of an interpretation from which an expression of opinion may be inferred. *State v. Lee*, 277 N.C. 205, 176 S.E.2d 765 (1970).

A charge must be construed contextually, and isolated portions of it will not be held prejudicial when the charge as a whole is correct. *State v. McWilliams*, 277 N.C. 680, 178 S.E.2d 476 (1971); *State v. Lee*, 277 N.C. 205, 176 S.E.2d 765 (1970).

**Instructions Should Be Fair to Both Sides.**—A compliance with this section gives to the jury instructions which are designed to be fair to both sides. *Key v. Merritt-Holland Welding Supplies, Inc.*, 5 N.C. App. 654, 169 S.E.2d 27 (1969).

The litigants are not entitled to determine the exact sequence of the charge to the jury, and are not entitled to have the trial judge use the words and expressions as formulated by the litigant. *Key v. Merritt-Holland Welding Supplies, Inc.*, 5 N.C. App. 654, 169 S.E.2d 27 (1969).

**Insubstantial technical errors in the charge** which could not have affected the result will not be held prejudicial. *State v. McWilliams*, 277 N.C. 680, 178 S.E.2d 476 (1971).

**Broadside Exception Untenable.—**

An exception to the entire charge of the court is a broadside exception and presents no question for review upon appeal. *State v. Jackson*, 6 N.C. App. 406, 170 S.E.2d 137 (1969).

An assignment of error to the court's failure to charge the law and explain the evidence as required by statute is a broadside exception and will not be considered. *Panhorst v. Panhorst*, 9 N.C. App. 258, 175 S.E.2d 609 (1970).

**Exception Must Be Specific.—**

The exception and assignment of error to the failure of the court to charge the law arising on the evidence on a particular aspect should set out the appellant's contention as to what the court should have charged, or the particular matters which the appellant asserts were omitted. *Panhorst v. Panhorst*, 9 N.C. App. 258, 175 S.E.2d 609 (1970).

**Where the exception fails to specify the matters omitted, it cannot be aided by an assignment of error**, since the appellee is entitled to be apprised of the theory of the appeal. *Panhorst v. Panhorst*, 9 N.C. App. 258, 175 S.E.2d 609 (1970).

**Specific Prayers, etc.—**

If defendant desires fuller instructions as to the evidence or contentions, he should so request. His failure to do so precludes him from assigning this as error on appeal. *State v. Sanders*, 276 N.C. 598, 174 S.E.2d 487 (1970).

**Cure of Error in Instruction.**—Any error in the instruction excepted to as an expression of the court's opinion on the facts was completely cured by the instruction which followed, that the court had no opinion. *State v. Hutson*, 10 N.C. App. 653, 179 S.E.2d 858 (1971).

**An exception to an excerpt from charge** ordinarily does not challenge the omission of the court to charge further on the same or any other aspect of the case. *Panhorst v. Panhorst*, 9 N.C. App. 258, 175 S.E.2d 609 (1970).

**Objections Will Not Be Considered for First Time on Appeal.**—Where defendant did not object to the court's statement of the State's contentions at the time they were given, objections thereto will not be considered for the first time on appeal. *State v. King*, 6 N.C. App. 702, 171 S.E.2d 33 (1969).

**But Expressions of Opinion May be Objected to on Appeal.**—Exceptions to an expression of opinion in the statement of contentions may be taken by the aggrieved party for the first time upon appeal. *Voorhees v. Guthrie*, 9 N.C. App. 266, 175 S.E.2d 614 (1970).

**B. Explanation Required.**

**1. In General.**

**Rule Stated.—**

This section requires the judge to explain the law but give no opinion on the facts. The purpose of the section is to secure the right of every litigant to have his cause considered by an impartial judge and an unbiased jury. *State v. Lee*, 277 N.C. 205, 176 S.E.2d 765 (1970).



This statute requires the judge to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. *Wood v. Nelson*, 5 N.C. App. 407, 168 S.E.2d 712 (1969).

The requirement of this section is met by presentation of the principal features of the evidence relied on respectively by the prosecution and defense. *State v. Craig*, 11 N.C. App. 196, 180 S.E.2d 376 (1971).

The judge is required to declare and explain the law arising on the evidence. *State v. Duboise*, 279 N.C. 73, 181 S.E.2d 393 (1971).

**Recital of What Evidence Tended to Show without Instruction on Application of Law.**—Where the trial court gives a recital of what some of the evidence tended to show, but no instruction is given as to how the law applies to it, the jury is left unaided to apply the abstract principles of law to the facts, and this constitutes error requiring a new trial. *State v. McKinnon*, 9 N.C. App. 724, 177 S.E.2d 299 (1970).

#### **Contention of Parties.**—

The manner of stating the contentions of the parties, if indicative of the court's opinion, is within the prohibition of this section. *Voorhees v. Guthrie*, 9 N.C. App. 266, 175 S.E.2d 614 (1970).

In instructing the jury the court is not required to recapitulate all of the evidence. *State v. Craig*, 11 N.C. App. 196, 180 S.E.2d 376 (1971).

Although the judge is not required to state or recapitulate the contentions of the parties, it is permissible for him to do so. *State v. Holway*, 8 N.C. App. 340, 174 S.E.2d 54 (1970).

The recapitulation of all the evidence is not required under this section, and nothing more is required than a clear instruction which applies the law to the evidence and gives the position taken by the parties as to the essential features of the case. *State v. Greene*, 278 N.C. 649, 180 S.E.2d 789 (1971).

While the trial court is not required to state the contentions of the litigants at all, when the court does undertake to state the contentions of one party it must also give equal pertinent contentions of the opposing party. *State v. Billinger*, 9 N.C. App. 573, 176 S.E.2d 901 (1970).

**Stating Assumptions of Party as Contentions.**—The trial judge does not comply with the provisions of this section by stating as contentions what one of the parties

assumed. *Johnson v. Douglas*, 6 N.C. App. 109, 169 S.E.2d 505 (1969).

#### **Explanation of Subordinate Features, etc.**—

In accord with 5th paragraph in original. See *State v. Craig*, 11 N.C. App. 196, 180 S.E.2d 376 (1971).

Where the charge fully instructs the jury on all substantive features of the case, defines and applies the law thereto, and states the contention of the parties, it complies with this section and a party desiring further elaboration on a particular point, or of his contentions, or a charge on a subordinate feature of the case, must aptly tender request for special instructions. *State v. Garrett*, 5 N.C. App. 367, 168 S.E.2d 479 (1969).

Instructions to scrutinize the testimony of an alleged accomplice, or that the jury should not consider evidence withdrawn by the court, or explaining the difference between corroborative and substantive evidence, or charging how evidence relating to the credibility of a witness should be considered, or that certain evidence had been admitted solely for the purpose of corroboration, or that the jury should take its own recollection of the evidence, or instructions on defendant's evidence of good character, relate to subordinate features upon which the court is not required to charge in the absence of request for special instruction aptly made. *State v. Witherspoon*, 5 N.C. App. 268, 168 S.E.2d 243 (1969).

A party desiring further elaboration on a particular point, or of his contention, or a charge on a subordinate feature of the case must aptly tender his request for special instructions. Instructions to scrutinize the testimony of an alleged accomplice are not required when, as here, no request therefor has been made. *State v. Dunbar*, 8 N.C. App. 17, 173 S.E.2d 543 (1970).

## **2. Statement of Evidence.**

#### **Recapitulation Unnecessary.**—

In accord with 3rd paragraph in original. See *State v. Sanders*, 276 N.C. 598, 174 S.E.2d 487 (1970).

In accord with 6th paragraph in original. See *State v. Garrett*, 5 N.C. App. 367, 168 S.E.2d 479 (1969).

## **3. Explanation of Law.**

#### **Absence of Request, etc.**—

It is the duty of the trial judge even without special request to declare and explain the law as to all substantial features of the case arising on the evidence. *State v.*



Blizzard, 7 N.C. App. 395, 172 S.E.2d 106 (1970).

Even in the absence of request for special instructions, a failure to charge the law on the substantive features of the case arising on the evidence is prejudicial error. *Tharpe v. Brewer*, 7 N.C. App. 432, 172 S.E.2d 919 (1970).

**The mandate of this section is not met, etc.—**

In accord with 1st paragraph in original. See *Wood v. Nelson*, 5 N.C. App. 407, 168 S.E.2d 712 (1969).

**Judge Must Explain Law, etc.—**

The judge must declare and explain the law as it relates to the various aspects of the testimony offered. *Wood v. Nelson*, 5 N.C. App. 407, 168 S.E.2d 712 (1969).

The law must be applied to the facts in the judge's instruction to the jury. *Sebastian v. Kluttz*, 6 N.C. App. 201, 170 S.E.2d 104 (1969).

**The jury must not be left to apply the law to the facts and to decide for themselves what the party did, if anything, which would constitute a violation of the statute.** *Ford v. Jones*, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

**And it is not sufficient merely for the court to read a statute, etc.—**

It is error for a trial court to read the provisions of a statute to a jury without giving an explanation thereof in connection with the evidence where such explanation is necessary to inform the jury as to the meaning of the statute and as to its bearing on the case. *Ford v. Jones*, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

**But Reading Statute, etc.—**

Where the court, in charging the jury, read the statute upon which the indictment was based and pointed out the material part of the statute which applied to the charge against the defendant, this instruction was in keeping with the requirements of this section which makes it the duty of the judge to declare and explain the law of the case. *State v. Rennick*, 8 N.C. App. 270, 174 S.E.2d 122 (1970).

**Effect of Failure to Request Special Instructions.—**

In accord with original. See *Wood v. Nelson*, 5 N.C. App. 407, 168 S.E.2d 712 (1969).

**It is not incumbent upon the trial judge to charge with regard to the law on something that is no longer an issue before the jury.** The statute only requires the court to state only such evidence as is necessary to explain and apply the law to the facts in the case. *State v. Phillips*, 5 N.C. App. 353, 168 S.E.2d 704 (1969).

**Isolated Expressions Afford No Ground for Reversal If Charge as Whole Presents Law Fairly.—**

If the charge as a whole presents the law fairly and clearly to the jury, the fact that isolated expressions, standing alone, might be considered erroneous will afford no ground for a reversal. *State v. McWilliams*, 277 N.C. 680, 178 S.E.2d 476 (1971); *State v. Lee*, 277 N.C. 205, 176 S.E.2d 765 (1970).

**C. Illustrative Cases.**

**Civil and Criminal Negligence.** — Once the judge has given the jury the instructions which the pleadings and evidence require on the law of civil negligence, there is no need for him to superimpose an explanation of the law of criminal negligence. *Ford v. Jones*, 6 N.C. App. 722, 171 S.E.2d 103 (1969).

**Duty of Judge to Determine If Evidence or Deducible Inferences Prove Lower Grade of Murder.**—It is the duty of the judge to determine, in the first instance, if there is any evidence or any inference fairly deducible therefrom tending to prove one of the lower grades of murder. Having done so, and having concluded that there is no basis for submission of manslaughter to the jury, it is the duty of the judge to instruct it accordingly. *State v. Duboise*, 279 N.C. 73, 181 S.E.2d 393 (1971).

**Prosecution for Manslaughter.**—Where in a prosecution for manslaughter the trial judge stated defendant's evidence to the extent necessary to explain the application of the law thereto, particularly with regard to the defense that he was not intoxicated and that his conduct in driving his car and his loss of memory concerning the collision had been caused by being struck on the head in the fight and defendant did not request any additional instructions, there was no prejudicial error. *State v. Craig*, 11 N.C. App. 196, 180 S.E.2d 376 (1971).

**Reckless Driving.—**

If a party has properly pleaded reckless driving and the judge undertakes to charge upon it, this section requires him to tell the jury what facts they might find from the evidence would constitute reckless driving. It is not sufficient for the judge to read the statute and then leave it to the jury to apply the law to the facts and to decide for themselves what defendant's driver did, if anything, which constituted reckless driving. *Ford v. Jones*, 6 N.C. App. 722, 171 S.E.2d 103 (1969).



**§ 1-180.1. Judge not to comment on verdict.**—In criminal actions the presiding judge shall make no comment in open court in the presence or hearing of all, or any member or members, of the panel of jurors drawn or summoned for jury duty at any session of court, upon any verdict rendered at such session of court, and if any presiding judge shall make any comment as herein prohibited, or shall praise or criticize any jury on account of its verdict, whether such comment, praise or criticism be made inadvertently or intentionally, such praise, criticism or comment by the judge shall constitute valid grounds as a matter of right, for the continuance for the session of any action remaining to be tried during that week at such session of court, upon motion of a defendant or upon motion of the State. The provisions of this section shall not be applicable upon the hearing of motions for a new trial, motions to set aside the verdict of a jury, or a motion made in arrest of judgment. (1955, c. 200; 1967, c. 954, s. 3; 1971, c. 381, s. 12.)

**Editor's Note.**—

1971, substituted "session" for "term" in

The 1971 amendment, effective Oct. 1, four places in the first sentence.

### **§ 1-181. Requests for special instructions.**

**Failure to Sign—Discretion of Court.**—

Cited in State Highway Comm'n v.

In accord with original. See State v. Hardee, 6 N.C. App. 147, 169 S.E.2d 533 (1969).

Yarborough, 6 N.C. App. 294, 170 S.E.2d 159 (1969).

**Applied in** Wood v. Nelson, 5 N.C. App. 407, 168 S.E.2d 712 (1969).

### **§ 1-182. Instructions in writing; when to be taken to jury room.**

**Editor's Note.**—

present practice and future proposals, see 6

For comment on N.C. jury charge,

Wake Forest Intra. L. Rev. 459 (1970).

**§ 1-183.1. Effect on counterclaim of dismissal as to plaintiff's claim.**—The granting of a motion by the defendant for judgment of dismissal as to the plaintiff's cause of action shall not amount to the taking of a voluntary dismissal on any counterclaim which the defendant was required or permitted to plead pursuant to G.S. 1A-1, Rule 13. (1959, c. 77; 1971, c. 1093, s. 3.)

**Editor's Note.**— The 1971 amendment substituted "dismissal" for "nonsuit" in two

places and substituted "G.S. 1A-1, Rule 13" for "G.S. 1-137."

## **SUBCHAPTER VIII. JUDGMENT.**

### **ARTICLE 23.**

#### *Judgment.*

**§ 1-217.2. Judgments by default to remove cloud from title to real estate validated.**—In every case where prior to the 1st day of April, 1967, a judgment by default final has been entered by the clerk of superior court of any county in this State in an action to remove cloud from title to real estate, the said judgment is hereby to all intents and purposes validated, and said judgment is hereby declared to be regular, proper and a lawful judgment in all respects according to the provisions of same. (1961, c. 628; 1971, c. 59.)

**Editor's Note.**— The 1971 amendment substituted "1967" for "1956" near the beginning of this section. The amendatory

act provides that it shall not apply to pending litigation.

### **§ 1-232. Judgment roll.**

**Purpose of Introducing Judgment Roll.**—

In establishing a chain of title the purpose of introducing the judgment roll is to show the commissioner's judicial authority to

convey. Keller v. Hennessee, 11 N.C. App. 43, 180 S.E.2d 452 (1971).

**Judgment Roll, Rather than Judgment, Must Be Introduced.**—The requirement is



not that the judgment be introduced, but that the judgment roll be introduced to show the judicial authority. *Keller v. Hennessee*, 11 N.C. App. 43, 180 S.E.2d 452 (1971).

**Failure to Offer Judgment Roll in Evidence.**—Where a party is seeking to establish his chain of title and introduces into

evidence a deed executed by a commissioner, but fails to offer in evidence the judgment roll to establish that the person named was in fact a commissioner, and had authority to convey, there is a break in the chain of title. *Keller v. Hennessee*, 11 N.C. App. 43, 180 S.E.2d 452 (1971).

### § 1-233. Docketed and indexed; held as of first day of session.—

Every judgment of the superior or district court, affecting the right to real property, or requiring in whole or in part the payment of money, shall be entered by the clerk of said superior court on the judgment docket of the court. The entry must contain the names of the parties, and the relief granted, date of judgment, and the date, hour and minute of docketing; and the clerk shall keep a cross-index of the whole, with the dates and numbers thereof. In all cases affecting the title to real property the clerk shall enter upon the judgment docket the number and page of the minute docket where the judgment is recorded, and if the judgment does not contain particular description of the lands, but refers to a description contained in the pleadings, the clerk shall enter upon the minute docket, immediately following the judgment, the description so referred to.

All judgments rendered in any county by the superior or district court, during a session of the court, and docketed during the same session, or within ten days thereafter, are held and deemed to have been rendered and docketed on the first day of said session, for the purpose only of establishing equality of priority as among such judgments. (Sup. Ct. Rule VIII; C. C. P., s. 252; Code, s. 433; Rev., s. 573; 1909, c. 709; C. S., s. 613; 1929, c. 183; 1943, c. 301, s. 4½; 1971, c. 268, s. 6.)

#### Editor's Note.—

The 1971 amendment, effective July 1, 1971, inserted "or district" near the beginning of the first sentence of the first para-

graph and near the beginning of the second paragraph and substituted "session" for "term" in three places in the second paragraph.

**§ 1-234. Where and how docketed; lien.**—Upon filing a judgment roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment docket of the court of the county where the judgment roll was filed, and may be docketed on the judgment docket of the court of any other county upon the filing with the clerk thereof of a transcript of the original docket, and is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for 10 years from the date of the rendition of the judgment. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the 10 years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith. (C. C. P., s. 254; Code, s. 435; Rev., s. 574; C. S., s. 614; 1971, c. 268, s. 7.)

#### I. IN GENERAL.

##### Editor's Note.—

The 1971 amendment, effective July 1,

1971, deleted "superior" preceding "court" in two places in the first sentence.

**§ 1-236:** Repealed by Session Laws 1971, c. 268, s. 34, effective July 1, 1971.

**§ 1-236.1. Transcripts of judgments certified by deputy clerks validated.**—Each transcript of judgment from the original docket of the superior or district court of a county where the same was rendered and docketed, heretofore



certified under the official seal of said court, by a deputy clerk thereof, in his own name as such deputy clerk, and docketed on the judgment docket of another county in the State, is hereby validated and declared of full force and effect in such county where docketed, from the date of docketing of the same, to the same extent and with the same effect as if said transcript of judgment had been certified in the name of the clerk of the superior court of said original county, and under his hand and official seal. (1943, c. 11; 1971, c. 268, s. 8.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, inserted "or district" near the beginning of the section.

§ 1-244: Repealed by Session Laws 1971, c. 268, s. 34, effective July 1, 1971.

§ 1-245. **Cancellation of judgments discharged through bankruptcy proceedings.**—When a referee in bankruptcy furnishes the clerk of the superior court of any county in this State a written statement or certificate to the effect that a bankrupt has been discharged, indicating in said certificate that the plaintiff or judgment creditor in whose favor judgments against the defendant bankrupt are docketed in the office of the clerk of the superior court have received due notice as provided by law from the said referee, and that said judgments have been discharged, it shall be the duty of the clerk of the superior court to file said certificate and enter a notation thereof on the margin of said judgments.

This section shall apply to judgments of this kind already docketed as well as to future judgments of the same kind. (1937, c. 234, ss. 1-4; 1971, c. 268, s. 8.1.)

**Editor's Note.**—

The 1971 amendment, effective July 1, 1971, deleted the former third paragraph,

providing a fee of one dollar for the filing of the instrument or certificate and the making of new notations.

## ARTICLE 26.

### *Declaratory Judgments.*

§ 1-253. **Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.**

**In General.**—

In accord with 6th paragraph in original. See *City of Raleigh v. Norfolk S. Ry.*, 275 N.C. 454, 168 S.E.2d 389 (1969); *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

In accord with 7th paragraph in original. See *City of Raleigh v. Norfolk S. Ry.*, 275 N.C. 454, 168 S.E.2d 389 (1969); *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

In accord with 8th paragraph in original. See *Bland v. City of Wilmington*, 10 N.C. App. 163, 178 S.E.2d 25 (1970).

Where there can be no doubt that litigation is forthcoming, the plaintiff should not be required to await suit, perhaps indefinitely, thereby running the risk that evidence relating to the facts will be lost. This is especially true where in the meantime plaintiff would have to maintain sufficient reserves to cover the claim. *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

**Anticipatory Judgments Not Issued.** — The courts of this State do not issue

anticipatory judgments resolving controversies that have not arisen. *Bland v. City of Wilmington*, 10 N.C. App. 163, 178 S.E.2d 25 (1970).

**Mere Fear or Apprehension of Future Claim Not Grounds.**—A mere fear or apprehension that a claim may be asserted against a party in the future is not grounds for issuing a declaratory judgment. *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

**Unavailability of Adequate Remedy at Law Not Necessary.**—For a court to have jurisdiction under the Declaratory Judgment Act it is not necessary for a plaintiff to show that an adequate remedy at law is unavailable. *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

**Necessity for a Controversy.**—

In accord with 7th paragraph in original. See *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

In accord with 8th paragraph in original. See *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E.2d 552 (1970).



In accord with 15th paragraph of original. See *Bland v. City of Wilmington*, 10 N.C. App. 163, 178 S.E.2d 25 (1970).

Actions for declaratory judgment will lie for an adjudication of rights, status, or other legal relations only when there is an actual existing controversy between the parties. *Bland v. City of Wilmington*, 10 N.C. App. 163, 178 S.E.2d 25 (1970).

For a court to have jurisdiction under the Declaratory Judgment Act it is required only that the plaintiff shall allege in his complaint and show at the trial, that a real controversy arising out of their opposing contentions as to their respective legal rights and liabilities under a deed, will or contract in writing, or under a statute, municipal ordinance, contract or franchise, exists between or among the parties, and that the relief prayed for will make certain that which is uncertain and secure that which is insecure. *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

Actual controversy is justiciable under the Declaratory Judgment Act. *Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E.2d 813 (1971).

**Parties cannot confer jurisdiction** upon a court in declaratory judgment proceedings by consent, stipulation or agreement. *City of Raleigh v. Norfolk S. Ry.*, 275 N.C. 454, 181 S.E.2d 799 (1971).

**Jurisdiction lies where the court is convinced that litigation, sooner or later, appears to be unavoidable.** *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 181 S.E.2d 799 (1971).

**Plaintiff must show the existence of the conditions upon which the court's jurisdiction may be invoked.** *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

#### **General Principles Govern Demurrers.—**

Demurrers in declaratory judgment actions are controlled by the same principles applicable in other cases. *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

**A demurrer is rarely an appropriate pleading, etc.—**

A demurrer is rarely an appropriate pleading to a petition for declaratory judgment. However, demurrers are proper

pleadings and should be sustained where the record is plain that no basis for declaratory relief exists, as where no actual controversy is alleged. *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

#### **Construction and Validity of Statute. —**

This section furnishes a proper method for determining all controversies relative to the construction and validity of a statute. *City of Raleigh v. Norfolk S. Ry.*, 275 N.C. 454, 168 S.E.2d 389 (1969).

It is unnecessary for an assailed statute to have taken effect in order to entitle one whose rights it affects to contest it by declaratory action. However, it is well settled that the court will not entertain a declaratory action with respect to the effect and validity of a statute in advance of its enactment. *City of Raleigh v. Norfolk S. Ry.*, 275 N.C. 454, 168 S.E.2d 389 (1969).

#### **Validity of Attempt to Sell Part of Trust Property. —**

While proceedings under this Article have been given a wide latitude, nevertheless they are not without limitation, and it can hardly be said the court is expected to lend its general equity jurisdiction to proceedings to determine the validity of an attempt to sell part of the trust property for the benefit and preservation of a trust. *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

**Applied in** *Dillon v. North Carolina Nat'l Bank*, 6 N.C. App. 584, 170 S.E.2d 571 (1969); *Godfrey v. Patrick*, 8 N.C. App. 510, 174 S.E.2d 674 (1970); *Kale v. Forrest*, 9 N.C. App. 82, 175 S.E.2d 752 (1970); *Jernigan v. Lee*, 9 N.C. App. 582, 176 S.E.2d 899 (1970); *Nationwide Mut. Ins. Co. v. Fireman's Fund Ins. Co.*, 9 N.C. App. 193, 175 S.E.2d 741 (1970).

**Quoted in** *Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E.2d 813 (1971).

**Stated in** *North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 180 S.E.2d 818 (1971).

**Cited in** *State Educ. Assistance Authority v. Bank of Statesville*, 276 N.C. 576, 174 S.E.2d 551 (1970); *Howell v. Gentry*, 8 N.C. App. 145, 174 S.E.2d 61 (1970); *Reading v. Dixon*, 10 N.C. App. 319, 178 S.E.2d 322 (1971); *Latham v. Taylor*, 10 N.C. App. 268, 178 S.E.2d 122 (1970).

### **§ 1-254. Courts given power of construction of all instruments.**

**In General.**—The Declaratory Judgment Act permits any person affected by a statute or municipal ordinance to obtain a declaration of his rights thereunder. *Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E.2d 813 (1971).

**When Rights of Parties Affected by Statutes. —** When the rights of parties are affected by §§ 160A-60, 160A-291 and other

statutes, to the end that they may be relieved "from uncertainty and insecurity," such parties are entitled to have the applicable statutes construed and their rights declared, and a real controversy exists between the parties. *Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E.2d 813 (1971).

**Applied in** *City of Raleigh v. Norfolk S.*



Ry., 275 N.C. 454, 168 S.E.2d 389 (1969); Elliott v. Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

Stated in North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

### § 1-255. Who may apply for a declaration.

Applied in Kale v. Forrest, 9 N.C. App. 82, 175 S.E.2d 752 (1970).

### § 1-256. Enumeration of declarations not exclusive.

The purpose of this section, etc.—

In accord with original. See Elliott v.

Ballentine, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

### § 1-260. Parties.

**"Necessary Party".**—A person is a necessary party to an action when he is so vitally interested in the controversy involved in the action that a valid judgment cannot be rendered in the action completely and finally determining the controversy without his presence as a party. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

The term "necessary parties" embraces all persons who have or claim material interests in the subject matter of a controversy, which interests will be directly affected by an adjudication of the controversy. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

Necessary or indispensable parties are those whose interests are such that no decree can be rendered which will not affect them, and therefore the court cannot proceed until they are brought in. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

**"Proper Parties".** — Proper parties are those interests may be affected by a decree, but the court can proceed to adjudicate the rights of others without necessarily affecting them, and whether they shall be brought in or not is within the discretion of the court. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

**Test Whether Persons Must Be Joined.**—A sound criterion for deciding whether particular persons must be joined in litigation between others appears in this definition: Necessary parties are those persons who have rights which must be ascertained and settled before the rights of the parties to the suit can be determined. North Carolina Monroe Const. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

**Judgment in Absence of Non-Parties Whose Interests May Be Prejudicially Affected.**—While persons not parties to a proceeding for a declaratory judgment

would not be bound by the judgment, it has been held that judgment should not be entered in their absence if they have such an interest in the controversy that their rights would be prejudicially affected by the judgment. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

**Obtaining Declaration that Contract between Defendant and Another Party Is Invalid.**—Where the purpose of the action is to obtain a declaration that a contract between the defendant and another party is invalid, the other party, not being a party to this action, would not be legally bound by a judgment rendered here, and its rights, if any, under the contract with the defendant would be adversely affected by a declaration of rights, and if the plaintiff should prevail in the action, the defendant, though forbidden by the judgment of the court to perform its contract, might well be sued for nonperformance by the absent party; therefore, that party is a necessary party in a proceeding to declare its contract with the defendant invalid, and the court below cannot properly determine the validity of that contract without making the absent party a party to the proceeding. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

**Person Contracting with City Must Be Made Party to Suit on Contract Validity.**—The court cannot pass upon the validity of a city's contract where the person contracting with the city had not been made a party. North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ., 278 N.C. 633, 180 S.E.2d 818 (1971).

**Construction of Will in Absence of Necessary Party.**—The practice as to parties may be somewhat liberalized under the Declaratory Judgment Act, but where it appears, in a case involving the construction of a will, that the absence of a necessary party prevents the entry of a judgment finally settling and determining the question of interpretation, the court should refuse to deal with the merits of the case



until the absent person is brought in as a party to the action. *North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 180 S.E.2d 818 (1971).  
**Stated** in *Elliott v. Ballentine*, 7 N.C. App. 682, 173 S.E.2d 552 (1970).

**§ 1-262. Hearing before judge where no issues of fact raised or jury trial waived; what judge may hear.**—Proceedings under this Article shall be tried at a session of court, as in other civil actions. If no issues of fact are raised, or if such issues are raised and the parties waive a jury trial, by agreement of the parties the proceedings may be heard before any judge of the trial division in which the proceeding is pending. If the parties do not agree upon a judge for the hearing and the proceeding is in the Superior Court Division, then upon motion of the plaintiff, the proceeding may be heard by a resident superior court judge of the district, or a superior court judge holding the courts of the district, or by any judge holding a session of superior court within the district. If the parties do not agree upon a judge and the proceeding is in the District Court Division, then upon motion of the plaintiff, the proceeding may be heard by the chief district judge or by a district judge authorized by the chief judge to hear motions and enter interlocutory orders. Such motion shall be in writing, with 10 days' notice to the defendant, and the judge designated shall fix a time and place for the hearing and notify the parties. Upon notice given, the clerk of the court in which the action is pending shall forward the papers in the proceeding to the judge designated. The hearing by the judge shall be governed by the practice for hearings in other civil actions before a judge without a jury. References to judges of the superior court in this section include emergency and special judges. (1931, c. 102, s. 10; 1971, c. 268, s. 9.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, rewrote this section.

### § 1-263. Costs.

**Applied** in *Dillon v. North Carolina Nat'l Bank*, 6 N.C. App. 584, 170 S.E.2d 571 (1969).

### § 1-264. Liberal construction and administration.

**Applied** in *City of Raleigh v. Norfolk S. Ry.*, 275 N.C. 454, 168 S.E.2d 389 (1969).  
**Quoted** in *Pilot Title Ins. Co. v. Northwestern Bank*, 11 N.C. App. 444, 181 S.E.2d 799 (1971); *Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E.2d 813 (1971).

## SUBCHAPTER IX. APPEAL.

### ARTICLE 27.

#### *Appeal.*

### § 1-271. Who may appeal.

A legal proceeding must be prosecuted by a legal person, whether it be a natural person, sui juris, or a group of individuals or other entity having the capacity to sue and be sued, such as a corporation, partnership, unincorporated association, or governmental body or agency. In *re Coleman*, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

**Class Members Must Prosecute or Defend Class Actions.** — Even a class action must be prosecuted or defended by one or more named members of the class. In *re Coleman*, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

A legal proceeding prosecuted by an aggregation of anonymous individuals, known only to their counsel, is a phenomenon unknown to the law of this jurisdiction. In *re Coleman*, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

A party has no right to appeal from a judgment entered on his own motion. *Wachovia Bank & Trust Co. v. Morgan*, 9 N.C. App. 460, 176 S.E.2d 860 (1970).

**Section Applies to Proceedings Governed by Chapter 143, Article 33.**—The rule that an appeal to the appellate division may be prosecuted only at the instance of a party

or parties aggrieved by the judgment of the court or tribunal from which the appeal is taken, applies with as much force to pro-

ceedings governed by Chapter 143, Article 33, as to ordinary civil cases. In re Coleman, 11 N.C. App. 124, 180 S.E.2d 439 (1971).

**§ 1-272. Appeal from clerk to judge.**—Appeals lie to the judge of the superior court having jurisdiction, either in session or vacation, from judgments of the clerk of the superior court in all matters of law or legal inference. In case of such transfer or appeal neither party need give an undertaking for costs; and the clerk shall transmit, on the transfer or appeal, to the superior court, or to the judge thereof, the pleadings, or other papers, on which the issues of fact or of law arise. An appeal must be taken within 10 days after the entry of the order or judgment of the clerk upon due notice in writing to be served on the appellee and a copy of which shall be filed with the clerk of the superior court. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed, the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof. (C. C. P., ss. 109, 492; Code, ss. 116, 252, 253; Rev., ss. 586, 610, 611; C. S., s. 633; 1927, c. 15; 1971, c. 381, s. 12.)

**Editor's Note.**—

The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term time" in the first sentence.

**Jurisdiction When Proceeding before Clerk Is Brought before Superior Court Judge.** — The clerk is but a part of the superior court, and when a proceeding before the clerk is brought before the judge in any manner, the superior court's jurisdiction is not derivative but it has jurisdiction to hear and determine all matters in controversy as if the case was originally before him. However, the judge of superior court may in his discretion remand the cause to the clerk for further proceedings. *Redevelopment Comm'n v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971).

**Effect of Erroneous Transfer to Superior Court.** — Even when a proceeding is erroneously transferred to the superior court,

and the judge takes jurisdiction pursuant to § 1-276, he may in his discretion make new parties, allow them to answer, and hold the case for jury determination before further proceedings are held. *Redevelopment Comm'n v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971).

**Judge Has Full Powers Although Proceeding Is Erroneously Transferred from Clerk.**—Although a proceeding to condemn property for urban renewal is erroneously transferred from the clerk to the superior court before the clerk has acted on the exceptions to the commissioners' report, the judge of superior court has full power to consider and determine all matters in controversy as if the cause was originally before him. *Redevelopment Comm'n v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971).

**§ 1-273. Clerk to transfer issues of fact to civil issue docket.**—If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing session of the superior court. (C. C. P., c. 115; Code, s. 256; Rev., s. 588; C. S., s. 634; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term."

**§ 1-276. Judge determines entire controversy; may recommit.**

**Judge May Determine, etc.**—

In accord with 2nd paragraph in original. See *Redevelopment Comm'n v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971).

When plaintiff appeals from the clerk's order to the judge, the judge is not limited to a review of the action of the clerk, but is vested with jurisdiction "to hear and determine all matters in controversy in such action," and render such judgment or order within the limits provided by law as he

deems proper under all the circumstances made to appear to him. *Hendrix v. Alsop*, 278 N.C. 549, 180 S.E.2d 802 (1971).

**Effect of Erroneous Transfer to Superior Court.** — Even when a proceeding is erroneously transferred to the superior court, and the judge takes jurisdiction pursuant to this section he may in his discretion make new parties, allow them to answer, and hold the case for jury determination before further proceedings are held. Re-



development Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

**Judge Has Full Powers Although Proceeding Is Erroneously Transferred from Clerk.**—Although a proceeding to condemn property for urban renewal is erroneously transferred from the clerk to the superior court before the clerk has acted on the exceptions to the Commissioners' report, the judge of superior court has full power to consider and determine all matters in controversy as if the cause was originally before him. Redevelopment Comm'n v. Grimes, 277 N.C. 634, 178 S.E.2d 345 (1971).

**Judge May Dismiss Action as to Defendant.**—The trial judge has full power to deny the motion to enlarge the time to file complaint and to dismiss the action as to defendant. Hendrix v. Alsop, 278 N.C. 549, 180 S.E.2d 802 (1971).

§ 1-277. **Appeal from superior or district court judge.**—(a) An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, whether made in or out of session, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

(b) Any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause. (1818, c. 962, s. 4, P. R.; C. C. P., s. 299; Code, s. 548; Rev., s. 587; C. S., s. 638; 1967, c. 954, s. 3; 1971, c. 268, s. 10.)

#### I. EDITOR'S NOTE.

The 1971 amendment, effective July 1, 1971, inserted "or district" and substituted "session" for "term" in subsection (a).

### II. APPEAL IN GENERAL.

#### A. General Consideration.

Applied in Decker v. Coleman, 6 N.C. App. 102, 169 S.E.2d 487 (1969).

#### B. From What Decisions, Orders, etc., Appeal Lies.

**Appeal from Denial of Motion for Summary Judgment.**—Ordinarily, the denial of a motion for summary judgment does not affect a substantial right so that an appeal may be taken. The moving party is free to preserve his exception for consideration on appeal from the final judgment, and in case a substantial right is thought to be affected to the prejudice of the movant,

**And This Discretionary Ruling Ends Action.**—Where the trial judge has the entire cause before him because of plaintiff's appeal and in the exercise of his discretion he does not permit enlargement of time for filing the complaint, and dismisses the action as to the defendant, this discretionary ruling as to enlargement of time to file complaint, in effect, ends the action. Hendrix v. Alsop, 278 N.C. 549, 180 S.E.2d 802 (1971).

**Section Not Applicable to Probate Proceedings.**—Upon appeal from action taken by the clerk of the superior court, in the exercise of his probate jurisdiction, the jurisdiction of the superior court is derivative, and the provisions of this section are not applicable. In re Will of Spinks, 7 N.C. App. 417, 173 S.E.2d 1 (1970).

then a petition for a writ of certiorari is available. Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

To allow an appeal from a denial of a motion for summary judgment would open the flood gate of fragmentary appeals and cause a delay in administering justice. Motyka v. Nappier, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

#### C. What Supreme Court Will Consider.

**When Appeal from Interlocutory Order Not Premature.**—An appeal from an interlocutory order will not be considered premature if a substantial right of the appellant would be adversely affected by continuance of an injunction in effect pending final determination of the case. Seaboard Indus., Inc. v. Blair, 10 N.C. App. 323, 178 S.E.2d 781 (1971).

§ 1-279. **When appeal taken.**—The appeal must be taken from a judgment rendered out of session within 10 days after notice thereof, and from a judgment rendered in session within 10 days after its rendition, unless the record shows an appeal taken at the trial, which is sufficient, but execution shall not be suspended until the giving by the appellant of the undertakings hereinafter required;

provided, however, that if any motion permitted by G.S. 1A-1, Rule 59, is timely made or an amendment to or alteration of a judgment is effected by the methods prescribed in that same rule, the appeal need not be taken within the time limits stated above, but the appeal must be taken within 10 days from the signing of the order ruling on such motions or amending or altering the original judgment. (C. C. P., s. 300; Code, s. 549; 1889, c. 161; Rev., s. 590; C. S., s. 641; 1971, c. 381, s. 12; c. 989.)

**Editor's Note.** — The first 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in two places.

The second 1971 amendment, effective Oct. 1, 1971, added the proviso.

**Appeal to Be Dismissed Where Timely Notice Not Given or Properly Served.** — Where the notice of appeal is dated and filed more than ten days after the rendition

of a default judgment, and no notice of appeal is served on the plaintiff, the appeal from the entry of the judgment should be dismissed because timely notice was not given or properly served. *North Am. Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

**Applied in** *Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E.2d 446 (1971).

### § 1-280. Entry and notice of appeal.

**Cross Reference.**—See note to § 1-279.

**Applied in** *Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E.2d 446 (1971).

**§ 1-281. Appeals from judgments not in session.**—When appeals are taken from judgments of the clerk or judge not made in session, the clerk is authorized to make any and all necessary orders for the perfecting of such appeals. (Ex. Sess. 1921, c. 92, s. 19a; C. S., s. 642(a); 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term time."

### § 1-282. Case on appeal; statement, service, and return.

#### I. EDITOR'S NOTE.

For note on serving statement of case on appeal in North Carolina, see 47 N.C.L. Rev. 901 (1969).

#### III. REQUISITES OF CASE ON APPEAL—EXCEPTIONS.

**Duty of Solicitor to Scrutinize Record and Case on Appeal.** — Although the primary duty of preparing and docketing a true and adequate transcript of the record and case on appeal in a criminal case rests upon defense counsel, it is the duty of the solicitor to scrutinize the copy which appellant serves upon him. If it contains omissions, errors, or misleading juxtapositions it is the solicitor's responsibility to file exceptions or a counter case within his allotted time. *State v. Fox*, 277 N.C. 1, 175 S.E.2d 561 (1970).

#### V. SERVICE OF CASE AND COUNTERCASE.

##### A. Necessity and Mode of Service.

##### Rules requiring service, etc.—

It is established law in this State that the rules governing appeals are mandatory,

not directory. *State v. Lewis*, 9 N.C. App. 323, 176 S.E.2d 1 (1970).

##### B. Time of Service.

##### 1. In General.

##### Only Judge May, etc.—

Under § 15-180 and this section, only the judge who tried a case can extend the time for serving the statement of the case on appeal. *State v. Lewis*, 9 N.C. App. 323, 176 S.E.2d 1 (1970).

##### Subsequent Extension.—

Section 15-180 and this section do not authorize a trial judge to grant an appellant another extension of time to serve statement of case on appeal after the expiration of the session at which the judgment was entered. However, the trial judge is given authority to do this under Rule 50 of the Rules of Practice in the Court of Appeals. *State v. Lewis*, 9 N.C. App. 323, 176 S.E.2d 1 (1970).

#### VI. RELIEF GRANTED.

##### When No Case on Appeal.—

In accord with 3rd paragraph in original. See *State v. Lewis*, 9 N.C. App. 323, 176 S.E.2d 1 (1970).



**§ 1-283. Settlement of case on appeal.**—If the case on appeal is returned by the respondent with objections as prescribed, the appellant shall immediately request the judge to fix a time and place for settling the case before him. If the appellant delays longer than 15 days after the respondent serves his counter-case, or exceptions, to request the judge to settle the case on appeal, and delays for such period to mail the case and counter-case or exceptions to the judge, then the exceptions filed by the respondent shall be allowed, or the counter-case served by him shall constitute the case on appeal; but the time may be extended by agreement.

The judge shall forthwith notify the attorneys of the parties to appear before him for that purpose at a certain time and place, within the judicial district, which time shall not be more than 20 days from the receipt of the request. At the time and place stated, the judge shall settle and sign the case, and deliver a copy to the attorney of each party, or, if the attorneys are not present, file a copy in the office of the clerk of the court. If the judge has left the district before the notice of disagreement, he may settle the case without returning to the district.

In settling the case, the written instructions signed by the judge, and the written request for instructions signed by the counsel, and the written exceptions, are deemed conclusive as to what these instructions, requests, and exceptions were. If a copy of the case settled was delivered to the appellant, he shall within five days thereafter file it with the clerk, and if he fails to do so, the respondent may file his copy.

The judge shall settle the case on appeal within 60 days after the termination of a special session or after the courts of the districts have ended, and if the judge in the meantime has gone out of office, he shall settle the case as if he were still in office. Any judge failing to comply with this section is liable to a penalty of five hundred dollars (\$500.00), for the use of any person who sues for it. (C. C. P., s. 301; Code, s. 550; 1889, c. 161; Rev., s. 591; 1907, c. 312; C. S., s. 644; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, for “term” in the first sentence of the last effective Oct. 1, 1971, substituted “session” paragraph.

**§ 1-287.1. Dismissal of appeals to appellate division when statement of case not served within time allowed.**—When it appears to the court that statement of case on appeal to the Appellate Division has not been served on the appellee or his counsel within the time allowed, it shall be the duty of the judge, upon motion by the appellee, to enter an order dismissing such appeal; provided the appellant has been given at least five days’ notice of such motion. If the case be appealed from the District Court Division, the motion herein provided for may be heard by either a presiding judge or the chief district judge; if the case be appealed from the Superior Court Division, the motion herein provided for may be heard by either a resident superior court judge, a presiding judge, or a special judge residing within the district or a judge assigned to hold the courts of the district, in session or out of session, in any county of the district. The provisions of this section shall not apply in any case in which a sentence of death has been pronounced. The provisions of this section shall not apply in any case with respect to which there is no requirement to serve a case on appeal. The provisions of this section are not exclusive but are in addition to any other procedures for obtaining the dismissal of a case on appeal to the Appellate Division. (1959, c. 743; 1965, c. 136; 1969, c. 44, s. 7; 1971, c. 268, s. 11.)

**Editor's Note.**—

The 1971 amendment, effective July 1, 1971, deleted “superior” preceding “court” and “superior court” preceding “judge” in

the first sentence and rewrote the second sentence.

**Quoted in** State v. Virgil, 276 N.C. 217, 172 S.E.2d 28 (1970).

**§ 1-288. Appeals in forma pauperis; clerk's fees.**—When any party to a civil action tried and determined in the superior or district court at the time



of trial desires an appeal from the judgment rendered in the action to the Appellate Division, and is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, it shall be the duty of the judge or clerk of said court to make an order allowing said party to appeal from the judgment to the Appellate Division as in other cases of appeal, without giving security therefor. The party desiring to appeal from the judgment shall, during the session at which the judgment was rendered or within 10 days from the expiration by law of the session, make affidavit that he is unable by reason of his poverty to give the security required by law, and that he is advised by a practicing attorney that there is error in matter of law in the decision of the court in said action. The affidavit must be accompanied by a written statement from a practicing attorney of said court that he has examined the affiant's case, and is of opinion that the decision of the court, in said action, is contrary to law. Nothing contained in this section deprives the clerk of the superior court of his right to demand his fees for his certificate and seal as now allowed by law in such cases. Provided, that where the judge or the clerk has made an order allowing the appellant to appeal as a pauper and the appeal has been filed in the Appellate Division, and an error or omission has been made in the affidavit or certificate of counsel, and the error is called to the attention of the court before the hearing of the argument of the case, the court shall permit an amended affidavit or certificate to be filed correcting the error or omission. (1873-4, c. 60; Code, s. 553; 1889, c. 161; Rev., s. 597; 1907, c. 878; C. S., s. 649; 1937, c. 89; 1951, c. 837, s. 7; 1969, c. 44, s. 8; 1971, c. 268, s. 12.)

**Editor's Note.—**

The 1971 amendment, effective July 1, 1971, inserted "or district" near the beginning of the first sentence, substituted "session" for "term" in two places in the second sentence, deleted "superior" preceding "court" in four places in the first, second and third sentences and deleted "of the superior court" following "judge" and "clerk" in the last sentence. The amendment also deleted the former fourth sentence, requiring the clerk to pass upon and grant or deny a request for appeal

within ten days after the expiration of the term, and the former fifth sentence, relating to the clerk's fees where the appellant furnishes two true and correctly typewritten copies of the records on appeal.

**This section is applicable to appeals in juvenile proceedings** tried in the district court. Compliance with its terms is necessary to entitle juveniles to an order allowing them to appeal in forma pauperis. The requirements are mandatory and must be observed. In re Burrus, 275 N.C. 517, 169 S.E.2d 879 (1969).

**§ 1-298. Procedure after determination of appeal.**—In civil cases, at the first session of the superior or district court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause stands in its regular order on the docket for trial at such first session after the receipt of the certificate from the Appellate Division. (1887, c. 192, s. 2; Rev., s. 1526; C. S., s. 659; 1969, c. 44, s. 11; 1971, c. 268, s. 13.)

**Editor's Note.—**

The 1971 amendment, effective July 1, 1971, inserted "or district" near the begin-

ning of the first sentence and substituted "session" for "term" in the first and second sentences.

**§§ 1-299 to 1-301:** Repealed by Session Laws, 1971, c. 268, s. 34, effective July 1, 1971.



## SUBCHAPTER X. EXECUTION.

## ARTICLE 28.

*Execution.***§ 1-306. Enforcement as of course.**

**Judgment Directing Payment of Alimony.**—The statute of limitations does not apply to a judgment directing the payment of alimony. *Morse v. Zatkiewicz*, 5 N.C. App. 242, 168 S.E.2d 219 (1969).

**§ 1-310. When dated and returnable.** — Executions shall be dated as of the day on which they were issued, and shall be returnable to the court from which they were issued not more than 90 days from said date, and no executions against property shall issue until the end of the session during which judgment was rendered. (1870-1, c. 42, s. 7; 1873-4, c. 7; Code, s. 449; 1903, c. 544; Rev., s. 624; C. S., s. 672; 1927, c. 110; 1931, c. 172; 1953, c. 697; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term."

**§ 1-313. Form of execution.**—The execution must be directed to the sheriff, or to the coroner when the sheriff is a party to or interested in the action. In those counties where the office of coroner is abolished, or is vacant, and in which process is required to be executed on the sheriff, the authority to execute such process shall be vested in the clerk of court; however, the clerk of court is hereby empowered to designate and direct by appropriate order some person to act in his stead to execute the same. The execution must also be subscribed by the clerk of the court, and must refer to the judgment, stating the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it is for money, the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

- (1) **Against Property—No Lien on Personal Property until Levy.**—If it is against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of his personal property; and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter; but no execution against the property of a judgment debtor is a lien on his personal property, as against any bona fide purchaser from him for value, or as against any other execution, except from the levy thereof.
- (2) **Against Property in Hands of Personal Representative.**—If it is against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees it shall require the officer to satisfy the judgment out of such property.
- (3) **Against the Person.**—If it is against the person of the judgment debtor, it shall require the officer to arrest him, and commit him to the jail of the county until he pays the judgment or is discharged according to law.
- (4) **For Delivery of Specific Property.**—If it is for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was re-



covered, to be specified therein, if a delivery cannot be had; and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at any time thereafter, and in that respect is deemed an execution against property.

- (5) **For Purchase Money of Land.**—If the answer in an action for recovery of a debt contracted for the purchase of land does not deny, or if the jury finds, that the debt was so contracted, it is the duty of the court to have embodied in the judgment that the debt sued on was contracted for the purchase money of the land, describing it briefly; and it is also the duty of the clerk to set forth in the execution that the said debt was contracted for the purchase of the land, the description of which must be set out briefly as in the complaint. (C. C. P., s. 261; 1868-9, c. 148; 1879, c. 217; Code, ss. 234-236, 448; Rev., s. 627; C. S., s. 675; 1971, c. 653, s. 2.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, rewrote the opening paragraph, inserting the provisions as to execution in counties where the office of coroner is abolished and making other changes.

**§ 1-320. Summary remedy on forthcoming bond.**—If the condition of such bond be broken, the sheriff or other officer, on giving 10 days' previous notice in writing to any obligor therein, may on motion have judgment against him in a summary manner, before the superior court or before the district court, as the case may be, of the county in which the officer resides, for all damages which the officer has sustained, or may be adjudged liable to sustain, not exceeding the penalty of the bond, to be ascertained by a jury, under the direction of the court. (1822, c. 1141, P. R.; R. C., c. 45, s. 23; Code, s. 465; Rev., s. 635; C. S., s. 681; 1971, c. 268, s. 14.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, substituted "the district court" for "a justice of the peace" near the middle of the section and deleted "or justice" at the end of the section.

**§ 1-321. Entry of returns on judgment docket; penalty.**—When an execution is returned, the return of the sheriff or other officer must be noted by the clerk on the judgment docket; and when it is returned wholly or partially satisfied, it is the duty of the clerk of the court to which it is returned to send a copy of such last-mentioned return, under his hand, to the clerk of the superior court of each county in which such judgment is docketed, who must note such copy in his judgment docket, opposite the judgment, and file the copy with the transcript of the docket of the judgment in his office. A clerk failing to send a copy of the payments on the execution or judgment to the clerks of the superior court of the counties wherein a transcript of the judgment has been docketed, and a clerk failing to note said payment on the judgment docket of his court, shall, on motion, be fined one hundred dollars (\$100.00) nisi, and the judgment shall be made absolute upon notice to show cause at the succeeding session of the superior court of his county. (1871-2, c. 74, s. 2; 1881, c. 75; Code, s. 445; Rev., s. 636; C. S., s. 683; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" near the end of the last sentence.

**§ 1-322. Cost of keeping livestock; officer's account.**—The court shall make a reasonable allowance to officers for keeping and maintaining horses, cattle, hogs, or sheep, and all other property taken into their custody under legal process, the keeping of which is chargeable to them; and this allowance may be retained by the officers out of the sales of the property, in preference to the satisfaction of the process under which the property was seized or sold. The officer must make out his account and, if required, give the debtor or his agent a copy of it, signed



by his own hand, and must return the account with the execution or other process, under which the property has been seized or sold, to the court to whom the execution or process is returnable, and shall swear to the correctness of the several items set forth; otherwise he shall not be permitted to retain the allowance. (1807, c. 731, P. R.; R. C., c. 45, ss. 25, 26; Code, ss. 466, 467; Rev., ss. 637, 638; C. S., s. 684; 1971, c. 268, s. 15.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "or justice" following "court" near the beginning of the first sentence and "justice or" preceding "court" near the middle of the second sentence.

## ARTICLE 29A.

### *Judicial Sales.*

#### Part 1. General Provisions.

**§ 1-339.1. Definitions.**—(a) A judicial sale is a sale of property made pursuant to an order of a judge or clerk in an action or proceeding in the superior or district court, including a sale pursuant to an order made in an action in court to foreclose a mortgage or deed of trust, but is not

- (1) A sale made pursuant to a power of sale
  - a. Contained in a mortgage, deed of trust, or conditional sale contract, or
  - b. Granted by statute with respect to a mortgage, deed of trust, or conditional sale contract, or
- (2) A resale ordered with respect to any sale described in subsection (a)(1), where such original sale was not held under a court order, or
- (3) An execution sale, or
- (4) A sale ordered in a criminal action, or
- (5) A tax foreclosure sale, or
- (6) A sale made pursuant to Article 4 of Chapter 35 of the General Statutes, relating to sales of estates held by the entireties when one or both spouses are mentally incompetent, or
- (7) A sale made in the course of liquidation of a bank pursuant to G.S. 53-20, or
- (8) A sale made in the course of liquidation of an insurance company pursuant to Article 17A of Chapter 58 of the General Statutes, or
- (9) Any other sale the procedure for which is specially provided by any statute other than this Article.

(b) As hereafter used in this Article, "sale" means a judicial sale. (1949, c. 719, s. 1; 1971, c. 268, s. 16.)

**Editor's Note.**—

The 1971 amendment, effective July 1, 1971, inserted "or district" in the opening paragraph of subsection (a).

**§ 1-339.3. Application of Article to sale ordered by clerk; by judge; authority to fix procedural details.**

(b) The procedure prescribed by this Article applies to all sales ordered by a judge of the superior or district court, except that the judge having jurisdiction may, upon a finding and a recital in the order of sale of the necessity or advisability thereof, vary the procedure from that herein prescribed, but not inconsistently with G.S. 1-339.6 restricting the place of sale of real property, and not inconsistently with G.S. 1-339.27(a) and G.S. 1-339.36 requiring that a resale be ordered when an upset bid is submitted.

(c) The judge or clerk of court having jurisdiction has authority to fix and determine all necessary procedural details with respect to sales in all instances in

which this Article fails to make definite provisions as to such procedure. (1949, c. 719, s. 1; 1971, c. 268, ss. 17, 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, inserted "or district" near the beginning of subsection (b) and deleted "the superior" following "judge or clerk of" in subsection (c).

As subsection (a) was not affected by the amendment, it is not set out.

**§ 1-339.3A. Judge or clerk may order public or private sale.** — The judge or clerk of court having jurisdiction has authority in his discretion to determine whether a sale of either real or personal property shall be a public or private sale. Any private sale conducted under an order issued prior to July 1, 1955 by a judge or clerk of court having jurisdiction is hereby validated as to the order that such sale be a private sale. (1955, c. 74; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" in the first and second sentences.

**§ 1-339.8. Public sale of separate tracts in different counties.**—(a) When an order of public sale directs the sales of separate tracts of real property situated in different counties, exclusive jurisdiction over such sale remains in the superior or district court of the county where the proceeding, in which the order of sale was issued, is pending, but there shall be a separate advertisement, sale and report of sale with respect to the property in each county. In any such sale proceeding, the clerk of the superior court of the county where the original order of sale was issued, has jurisdiction with respect to the resale of separate tracts of property situated in other counties as well as in the clerk's own county, and an upset bid may be filed only with such clerk, except in those cases where the judge retains resale jurisdiction pursuant to G.S. 1-339.27.

(c) The sale, and each subsequent resale, of each such separate tract shall be subject to a separate upset bid; and to the extent deemed necessary by the judge or clerk of court of the county where the original order of sale was issued, the sale of each tract, after an upset bid thereon, shall be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(1971, c. 268, ss. 18, 19.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, inserted "or district" near the beginning of subsection (a) and deleted "the superior" following "judge or clerk of" near the middle of subsection (c).

As the rest of the section was not changed by the amendment, only subsections (a) and (c) are set out.

**§ 1-339.9. Sale as a whole or in parts.**—(a) When real property to be sold consists of separate lots or other units or when personal property consists of more than one article, the judge or clerk of court having jurisdiction may direct specifically

- (1) That it be sold as a whole, or
- (2) That it be sold in designated parts, or
- (3) That it be offered for sale by each method, and then sold by the method which produces the highest price.

(1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" in subsection (a).

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

**§ 1-339.10. Bond of person holding sale.**—(a) Whenever a commissioner specially appointed or a trustee in a deed of trust is ordered to sell property, the judge or clerk of court having jurisdiction



- (1) May in any case require the commissioner or trustee, before receiving the proceeds of the sale, to furnish bond to cover such proceeds, and
- (2) Shall require the commissioner or trustee to furnish such bond when the commissioner or trustee is to hold the proceeds of the sale other than for immediate disbursement upon confirmation of the sale.

(1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" in subsection (a). As the rest of the section was not changed by the amendment, only subsection (a) is set out.

**§ 1-339.11. Compensation of person holding sale.**—(a) If the person holding a sale is a commissioner specially appointed or a trustee in a deed of trust, the judge or clerk of court having jurisdiction shall fix the amount of his compensation and order the payment thereof out of the proceeds of the sale.

(1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" in subsection (a). As the rest of the section was not changed by the amendment, only subsection (a) is set out.

## Part 2. Procedure for Public Sales of Real and Personal Property.

### **§ 1-339.18. Public sale; posting notice of sale of personal property.**

(b) In addition to the foregoing, the notice of public sale shall be otherwise advertised as may be required by the judge or clerk of court pursuant to the provisions of G.S. 1-339.13(b)(2). (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" in subsection (b). As the rest of the section was not changed by the amendment, only subsection (b) is set out.

**§ 1-339.19. Public sale; exception; perishable property.** — If personal property to be sold at public sale is determined by the judge or clerk of court having jurisdiction to be perishable property because subject to rapid deterioration, he may order the sale thereof to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. The order of sale of such perishable property of a minor or incompetent when made by the clerk need not be approved by the judge. Confirmation of any sale of such perishable property is not necessary unless required by the order of sale. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" in the first sentence.

### **§ 1-339.20. Public sale; postponement of sale.**

(d) If a public sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the person authorized to make the sale shall report the facts with respect thereto to the judge or clerk of court having jurisdiction, who shall thereupon make an order for the public sale of the property to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of" near the middle of subsection (d). As the rest of the section was not changed by the amendment, only subsection (d) is set out.



**§ 1-339.23. Public sale; when confirmation of sale of personal property necessary; delivery of property; bill of sale.**—(a) When any person interested as a creditor, legatee, distributee, or otherwise, in the proceeds of a public sale of personal property, objects at the sale to the completion of the sale of any article of property on account of the insufficiency of the amount bid, title to such property shall not pass and possession of the property shall not be delivered until the sale of such property is reported and is confirmed by the judge or clerk of court having jurisdiction; but such objection to the completion of the sale of any article of property shall not prevent the completion of the sales of articles of property to which no objection is made where the same have been separately sold. When a judge or clerk having jurisdiction fails or refuses to confirm a sale of property which has thus been objected to, the procedure for a new sale of such property, including a new order of sale, shall be the same as if no such attempted sale has been held. This subsection shall not apply to perishable property sold pursuant to G.S. 1-339.19.

(b) Except as provided in subsection (a), the person holding a public sale of personal property shall deliver the property to the purchaser immediately upon compliance by the purchaser with the terms of the sale.

(c) The person holding a public sale may execute and deliver a bill of sale or other muniment of title for any personal property sold, and, upon application of the purchaser, shall do so when required by the judge or clerk of court having jurisdiction. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, the first sentence of subsection (a) and in effective July 1, 1971, deleted "the superior" following "judge or clerk of" in subsection (c).

**§ 1-339.26. Public sale; separate upset bids when real property sold in parts; subsequent procedure.**—When real property is sold at public sale in parts, as provided by G.S. 1-339.9, the sale, and each subsequent resale, of any such part shall be subject to a separate upset bid; and, to the extent the judge or clerk of court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "the superior" following "judge or clerk of."

**§ 1-339.28. Public sale; confirmation of sale.**—(a) No public sale of real property may be consummated until confirmed as follows:

- (1) If a public sale is ordered by a judge of the Superior Court Division, it may thereafter be confirmed by a resident superior court judge of the district or a superior court judge regularly holding the courts of the district.
- (2) If a public sale is ordered by a judge of the District Court Division, it may thereafter be confirmed by the judge so ordering, the chief district judge, or any district judge authorized by the chief judge to hear motions and enter interlocutory orders.
- (3) If a public sale is ordered by a clerk of court, it may thereafter be confirmed by the clerk of court so ordering.

(1971, c. 268, s. 20.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, rewrote subsection (a). As the rest of the section was not changed by the amendment, only subsection (a) is set out.

**§ 1-339.29. Public sale; real property; deed; order for possession.**—(a) Upon confirmation of a public sale of real property, the person authorized to hold the sale, or such other person as may be designated by the judge or



clerk of court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of sale, shall deliver the deed to the purchaser.

(c) The judge or clerk of court having jurisdiction of the proceeding in which the property is sold may grant an order for possession of real property so sold and conveyed, as against all persons in possession who are parties to the proceeding. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, As the rest of the section was not effective July 1, 1971, deleted "the superior" following "judge or clerk of" in subsections (a) and (c). changed by the amendment, only subsections (a) and (c) are set out.

**§ 1-339.32. Public sale; final report of person, other than commissioner or trustee in deed of trust.**—An administrator, executor or collector of a decedent's estate, or a receiver, or a guardian or trustee of a minor's or incompetent's estate, or an administrator, collector, conservator or guardian of an absent or missing person's estate, is not required to file a special account of his receipts and disbursements for property sold at public sale pursuant to this Article unless so directed by the judge or clerk of court having jurisdiction of the sale proceeding, but shall include in his next following account or report, either annual or final, an account of such receipts and disbursements. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, perior" following "judge or clerk of" near effective July 1, 1971, deleted "the superior" the end of the section.

### Part 3. Procedure for Private Sales of Real and Personal Property.

**§ 1-339.33. Private sale; order of sale.**—Whenever a private sale is ordered, the order of sale shall

- (1) Designate the person authorized to make the sale;
- (2) Describe real property to be sold, by reference or otherwise, sufficiently to identify it;
- (3) Describe personal property to be sold, by reference or otherwise, sufficiently to indicate its nature and quantity; and
- (4) Prescribe such terms of sale as the judge or clerk of court ordering the sale deems advisable. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, perior" following "judge or clerk of" in effective July 1, 1971, deleted "the subdivision (4)." subdivision (4).

**§ 1-339.38. Private sale; real property; deed; order for possession.**—(a) Upon confirmation of a private sale of real property, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of the sale, shall deliver the deed to the purchaser.

(b) The judge or clerk of court having jurisdiction of the proceeding in which the property is sold may grant an order for possession of real property so sold and conveyed, as against all persons in possession who are parties to the proceeding. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.** — The 1971 amendment, perior" following "judge or clerk of" in effective July 1, 1971, deleted "the subsections (a) and (b)." subsections (a) and (b).

**§ 1-339.39. Private sale; personal property; delivery; bill of sale.**—Upon compliance by the purchaser with the terms of a private sale of personal property, and upon confirmation of the sale when confirmation is required by G.S. 1-339.37, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of court having jurisdiction, shall deliver the property to the purchaser, and may execute and deliver a bill of sale or other



muniment of title, and, upon application of the purchaser, shall do so when required by the judge or clerk having jurisdiction. (1949, c. 719, s. 1; 1971, c. 268, s. 18.)

**Editor's Note.**—The 1971 amendment, perior" following "judge or clerk of" near effective July 1, 1971, deleted "the su the middle of the section.

## ARTICLE 31.

### *Supplemental Proceedings.*

**§ 1-352. Execution unsatisfied, debtor ordered to answer.**—When an execution against property of a judgment debtor, or any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or if he does not reside in the State, to the sheriff of the county where a judgment roll or a transcript of a judgment is filed, is returned wholly or partially unsatisfied, the judgment creditor at any time after the return, and within three years from the time of issuing the execution, is entitled to an order from the court to which the execution is returned or from the judge thereof, requiring such debtor to appear and answer concerning his property before such court or judge, at a time and place specified in the order, within the county to which the execution was issued. (C. C. P., s. 264; 1868-9, c. 95, s. 2; Code, s. 488, subsec. 1; Rev., s. 667; C. S., s. 711; 1971, c. 268, s. 21.)

**Editor's Note.**—

The 1971 amendment, effective July 1, 1971, deleted "justice's" preceding "judgment is filed" near the middle of the section.

**Cited in** *Wilson v. Crab Orchard Dev. Co.*, 276 N.C. 198, 171 S.E.2d 873 (1970).

**§ 1-352.1. Interrogatories to discover assets.**—As an additional method of discovering assets of a judgment debtor, the judgment creditor may prepare and serve on the judgment debtor written interrogatories concerning his property, at any time the judgment remains unsatisfied, and within three years from the time of issuing an execution. Such written interrogatories shall be fully answered under oath by the judgment debtor within 30 days of service on the judgment debtor, and the answer shall be filed by the judgment debtor with the clerk of the superior court wherein the original judgment is docketed. Copy of said answer shall be served upon the party submitting said written interrogatories, in the manner provided by the Rules of Civil Procedure.

Interrogatories may relate to any matters which can be inquired into under G.S. 1-352, and the debtor may object to any interrogatories that are deemed improper, but the making of objections shall not delay the answering of interrogatories to which objection is not made. If the objections are overruled, the court shall fix the time for answering the interrogatories. The number of interrogatories or sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment or oppression.

Upon failure of the judgment debtor to fully answer the written interrogatories the judgment creditor may petition the court for an order requiring the judgment debtor to fully answer, which order shall be served upon the judgment debtor in the same manner as a summons is served pursuant to the Rules of Civil Procedure, fixing the time within which the judgment debtor can answer the interrogatories, and further providing as an alternative that the judgment debtor may appear and answer concerning his property before such court or judge, at a time and place specified in said order.

Any person who disobeys an order of the court may be punished by the judge as for a contempt under the provisions of G.S. 1-368. (1971, c. 529, s. 1.)

**Editor's Note.**—Session Laws 1971, c. 529, s. 3, makes the act effective Oct. 1, 1971. The Rules of Civil Procedure are found in § 1A-1.



**§ 1-352.2. Additional method of discovering assets.** — In addition to the other provisions of this Article and as an additional method of discovering assets of a judgment debtor the clerk of the court or a judge of the court in the county wherein the original judgment is docketed, at any time the judgment remains unsatisfied, and within three years from the time of issuing an execution, upon motion of the judgment creditor showing good cause therefor, may:

- (1) Order the judgment debtor, his agent or anyone having possession or control of property or records of or pertaining to the judgment debtor, to produce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, all tax records, letters, objects or tangible things, not privileged, constituting property, or being evidence of property, of the judgment debtor and which are in his possession and custody, or subject to his control; or
- (2) Order the judgment debtor or anyone acting for or on his behalf to permit entry upon designated land or other property, real or personal, in his possession or control or subject to his control for the purpose of inspecting, measuring, surveying, appraising, copying, or photographing the property of the judgment debtor.
- (3) Prior notice of the motion, together with a copy thereof, shall be served on the judgment debtor as provided by the Rules of Civil Procedure. Upon the hearing, the order entered shall specify the time, place and manner for compliance therewith and may prescribe such terms and conditions as are just.
- (4) Any person who shall fail to comply with an order entered pursuant to this section may be punished as for a contempt under the provisions of G.S. 1-368. (1971, c. 711, s. 1.)

**Editor's Note.** — Session Laws 1971, c. 711, s. 2, makes the act effective Oct. 1, 1971. The Rules of Civil Procedure are found in § 1A-1.

**§ 1-362. Debtor's property ordered sold.**

**Editor's Note.** — For note on protection of debtor's rights, see 48 N.C.L. Rev. 164 (1969).

**§ 1-364. Filing and record of appointment; property vests in receiver.** — When the court or a judge grants an order for the appointment of a receiver of the property of the judgment debtor, it shall be filed in the office of the clerk of the superior court of the county where the judgment roll in the action or transcript of judgment, upon which the proceedings are taken, is filed; and the clerk shall record the order in a book to be kept for that purpose in his office, to be called Book of Orders Appointing Receivers of Judgment Debtors, and shall note the time of its filing therein. A certified copy of the order shall be delivered to the receiver named therein, and he is vested with the property and effects of the judgment debtor from the time of the service of the restraining order, if such restraining order has been made, and if not, from the time of the filing and recording of the order for the appointment of a receiver. The receiver of the judgment debtor is subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded. (C. C. P., s. 270; 1870-1, c. 245; Code, s. 495; Rev., s. 680; C. S. s. 723; 1971, c. 268, s. 22.)

**Editor's Note.** — The 1971 amendment, "judgment" near the middle of the first effective July 1, 1971, substituted "of" for sentence. "from justice's" between "transcript" and



## SUBCHAPTER XI. HOMESTEAD AND EXEMPTIONS.

## ARTICLE 32.

*Property Exempt from Execution.*

§ 1-371. **Sheriff to summon and swear appraisers.** — Before levying upon the real estate of any resident of this State who is entitled to a homestead under this Article, and the Constitution of this State, the sheriff [or a deputy sheriff designated by the sheriff, and who shall be 18 years of age or over], or other officer charged with the levy shall summon three discreet persons qualified to act as jurors, to whom he shall administer the following oath: "I, A. B., do solemnly swear (or affirm) that I have no interest in the homestead exemption of C. D., and that I will faithfully perform the duties of appraiser (or assessor, as the case may be), in valuing and laying off the same. So help me, God." In cases where he deems it necessary he may summon the county surveyor or some other competent surveyor to assist in laying off the homestead by metes and bounds. The portions of this section in brackets shall apply to the following counties only: Alamance, Ashe, Bertie, Brunswick, Buncombe, Cabarrus, Caldwell, Camden, Caswell, Chatham, Chowan, Cumberland, Currituck, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Gates, Graham, Guilford, Halifax, Harnett, Henderson, Hertford, Iredell, Jackson, Johnston, Lenoir, Lincoln, Martin, Mecklenburg, Moore, New Hanover, Onslow, Pasquotank, Perquimans, Pitt, Randolph, Rockingham, Rowan, Sampson, Scotland, Vance, Wayne, Wilson. (1868-9, c. 137, s. 2; Code, s. 502; 1893, c. 58; Rev., s. 687; C. S., s. 730; 1931, c. 58; 1933, cc. 37, 147; 1955, c. 20; 1967, c. 202; 1971, c. 1231, s. 1.)

**Editor's Note.—**

The 1971 amendment substituted "18" for "twenty-one" in the first sentence.

§ 1-381. **Exceptions to valuation and allotment; procedure.**—If the judgment creditor for whom levy is made, or judgment debtor or other person entitled to homestead and personal property exemption, is dissatisfied with the valuation and allotment of the appraisers or assessors, he, within 10 days thereafter, or any other creditor within six months and before sale under execution of the excess, may notify the adverse party and the sheriff having the execution in hand, and file with the clerk of the superior court of the county where the allotment is made a transcript of the return of the appraisers or assessors which they or the sheriff shall allow to be made upon demand, together with his objections in writing to said return. Thereupon the said clerk shall put the same on the civil issue docket of the superior court for trial at the next session thereof as other civil actions, and such issue joined has precedence over all other issues at that session. The sheriffs shall not sell the excess until after the determination of said action. The 10 days and six months respectively begin to run from the date of the filing of the return of the valuation and allotment of the appraisers or assessors by the officer with the clerk of the superior court of the county from whence the execution issued. (1883, c. 357; Code, s. 519; 1887, c. 272, s. 2; Rev., s. 699; C. S., s. 740; 1971, c. 381, s. 12.)

**Editor's Note.—**

The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in two places in the second sentence.

§ 1-382. **Revaluation demanded; jury verdict; commissioners; report.**—When an increase of the exemption or an allotment in property other than that set apart is demanded, the party demanding must in his exceptions specify the property from which the increase or reallocation is to be had. If the appraisal or assessment is reduced, the jury shall assess the value of the property embraced therein; if increased, the value of the property specified in the objections from which the increase is demanded shall also be assessed; but if the allotment is made



in property other than that first set apart, the jury shall assess the value of the property so allotted. The court shall appoint three disinterested commissioners to lay off and set apart the homestead and personal property exemption in accordance with the verdict of the jury and the judgment of the court, and in the manner prescribed by law. The commissioners, who shall be summoned by the sheriff, must meet upon the premises and, after being sworn by the sheriff to faithfully perform the duties of appraisers or assessors in allotting and laying off the homestead or personal property exemption, or both, in accordance with the verdict and judgment aforesaid, must allot and lay off the same and file their report to the next session of the court, when it shall be heard by the court upon exceptions thereto. (1885, c. 347; Rev., s. 700; C. S., s. 741; 1971, c. 268, s. 22.1; c. 381, s. 12.)

**Editor's Note.**—The first 1971 amendment, effective July 1, 1971, deleted "or a justice of the peace" following "sworn by the sheriff" in the last sentence.

The second 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" near the end of the last sentence.

**§ 1-384. Set aside for fraud, or irregularity.**—An appraisal or allotment by appraisers or assessors may be set aside for fraud, complicity, or other irregularity; but after an allotment or assessment is made or confirmed by the superior court during session, as hereinbefore provided, the homestead shall not thereafter be set aside or again laid off by any other creditor except for increase in value. (Code, s. 523; Rev., s. 702; C. S., s. 743; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "during session" for "at term time."

**§ 1-385. Return registered; original or copy evidence.**—When the homestead and personal property exemption is decided by the court during session the clerk of the superior court shall immediately file with the register of deeds of the county a copy of the same, which shall be registered as deeds are registered; and in all judicial proceedings the original or a certified copy of the return may be introduced in evidence. (Code, s. 524; Rev., s. 703; C. S., s. 744; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "during session" for "at term time."

**§ 1-386. Allotted on petition of owner.**—When any resident of this State desires to take the benefit of the homestead and personal property exemption as guaranteed by Article X of the State Constitution, or by this Article, such resident, his agent or attorney, must apply to the clerk of superior court of the county in which he resides, who shall appoint as assessors three disinterested persons, qualified to act as jurors, residing in said county. The jurors, on notice by the order of the clerk, shall meet at the applicant's residence, and, after taking the oath prescribed for appraisers before some officer authorized to administer an oath, lay off and allot to the applicant a homestead with metes and bounds, according to the applicant's direction, not to exceed one thousand dollars (\$1,000.00) in value, and make and sign a descriptive account of the same and return it to the office of the register of deeds.

Said assessors shall set apart of the personal property of said applicant, to be by him selected, articles of personalty to which he is entitled under this Chapter, not exceeding in value the sum of five hundred dollars (\$500.00), and make, sign and return a descriptive list thereof to the register of deeds. (1868-9, c. 137, ss. 7, 8; Code, ss. 511, 512; Rev., ss. 697, 704; C. S., s. 745; 1971, c. 268, s. 23.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, substituted "the clerk of superior court" for "a justice of the peace" in the first sentence and "clerk" for "justice" in the second sentence.



**§ 1-387. Advertisement of petition; time of hearing.**—When a person entitled to a homestead and personal property exemption files the petition before a clerk of superior court to have the same laid off and set apart under the preceding sections, the clerk shall make advertisement in some newspaper published in the county, for six successive weeks, and if there is no newspaper in the county, then at the courthouse door of the county in which the petition is filed, notifying all creditors of the applicant of the time and place for hearing the petition. The petition shall not be heard nor any decree made in the cause in less than six nor more than 12 months from the day of making advertisement as above required. (1868-9, c. 137, s. 11; Code, s. 515; Rev., s. 705; C. S., s. 746; 1971, c. 268, s. 24.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, substituted "clerk of superior court" for "justice of the peace" and "clerk" for "justice" in the first sentence.

**§ 1-389. Allotted to widow or minor children on death of homesteader.**—If a person entitled to a homestead exemption dies without the homestead having been set apart, his widow, if he leaves no children, or his child or children under the age of 18 years, if he leaves such, may proceed to have the homestead exemption laid off by petition. If the widow or children have failed to have the exemption set apart in the manner provided, then in an action brought by his personal representatives to subject the realty of the decedent to the payment of debts and charges of administration, it is the duty of the court to appoint three disinterested freeholders to set apart to such widow, child or children a homestead exemption under metes and bounds in the lands of the decedent. The freeholders shall under their hands and seals make return of the same to the court, which shall be registered in the same manner as homestead exemptions. (1868-9, c. 137, s. 10; Code, s. 514; 1893, c. 332; Rev., s. 707; C. S., s. 748; 1971, c. 1231, s. 1.)

**Editor's Note.**—  
The 1971 amendment substituted "18" for "twenty-one" in the first sentence.

**§ 1-392. Forms.**—The following forms must be substantially followed in proceedings under this Article:

[No. 1]

Appraisers' Return.

When the homestead is valued at one thousand dollars or less,  
and personal property also appraised.

The undersigned having been duly summoned and sworn to act as appraisers of the homestead and personal property exemption of A. B., of ..... Township, ..... County, by C. D., Sheriff (or constable or deputy) of said county, do hereby make the following return: We have viewed and appraised the homestead of the said A. B., and the dwellings and buildings thereon, owned and occupied by said A. B. as a homestead, to be one thousand dollars (or any less sum) and that the entire tract, bounded by the lands of ..... and ..... is therefore exempted from sale under execution according to law. At the same time and place we viewed and appraised at the values annexed the following articles of personal property, selected by said A. B. (here specify the articles and their value, to be selected by the debtor or his agent), which we declare to be a fair valuation, and that the said articles are exempt under said execution. We hereby certify that we are not related by blood or marriage to the judgment debtor or the judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.



Given under our hands and seals, this ..... day of ....., 19.....

O. K. .... [L. S.]  
L. M. .... [L. S.]  
R. S. .... [L. S.]

The above return was made and subscribed in my presence, day and date above given.

C. D. ...., (Sheriff or Constable).

[No. 2]

Petition for Homestead Before the Clerk of Superior Court  
..... County.

In the Matter of A. B.

A. B. respectfully shows that he (she or they, as the case may be) is (or are) entitled to a homestead exempt from execution in certain real estate in said county, and bounded and described as follows: (Here describe the property). The true value of which he (she or they, as the case may be) believes to be one thousand dollars, including the dwelling, and buildings thereon. He (she or they) further shows that he (she or they, as the case may be) is (or are) entitled to a personal property exemption from execution, to the value of (here state the value), consisting of the following property: (Here specify.) He (she or they, as the case may be) therefore prays your worship to appoint three disinterested persons qualified to act as jurors, as assessors, to view the premises, allot and set apart to your petitioner his homestead and personal property exemption, and report according to law.

[No. 3]

Form for Appraisal of Personal Property Exemption.

The undersigned having been duly summoned and sworn to act as appraisers of the personal property of A. B., of ..... Township, ..... County, and to lay off the exemption given by law thereto, by C. D., Sheriff (or other officer) of said county, do hereby make and subscribe the following return:

We viewed and appraised at the values annexed, the following articles of personal property selected by the said A. B., to wit: ..... which we declare to be a fair valuation, and that said articles are exempt under said execution.

We hereby certify, each for himself, that we are not related by blood or marriage to the judgment debtor or judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this ..... day of ....., 19.....

O. K. .... [L. S.]  
L. M. .... [L. S.]  
R. S. .... [L. S.]

The above return was made and subscribed in my presence, day and date above given.

C. D. ...., (Sheriff or Constable).

[No. 4]

Certificate of Qualification to Be Endorsed on Return by Sheriff.

The within named B. F., G. H., and J. R. were summoned and qualified according to law, as appraisers of the ..... exemption of the said A. B., under an execution in favor of X. Y., this ..... day of ....., 19.....

C. D. .... (Sheriff).

[No. 5]

Minute on Execution Docket.

X ..... vs. .... Y .....  
vs.

A ..... B .....  
Execution issued ..... 19.....

Homestead appraised and set off and return made ..... 19.....  
(Code, s. 524; Rev., s. 709; C. S., s. 751; 1971, c. 268, s. 25.)

**Editor's Note.** — The 1971 amendment, the Peace” and eliminated “Before .....  
effective July 1, 1971, substituted “the J.P.” in the heading of Form No. 2.  
Clerk of Superior Court” for “a Justice of

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

ARTICLE 33.

*Special Proceedings.*

**§ 1-394. Contested special proceedings; commencement; summons.**  
—Special proceedings against adverse parties shall be commenced as is prescribed for civil actions. The summons shall notify the defendant or defendants to appear and answer the complaint, or petition, of the plaintiff within 10 days after its service upon the defendant or defendants, and must contain a notice stating in substance that if the defendant or defendants fail to answer the complaint, or petition, within the time specified, plaintiff will apply to the court for the relief demanded in the complaint, or petition. The summons must run in the name of the State, and be dated and signed by the clerk, assistant clerk or deputy clerk of the superior court having jurisdiction in the special proceeding, and be directed to the defendant or defendants, and be delivered for service to some proper person, as defined by Rule 4(a) of the Rules of Civil Procedure. The clerk shall indicate on the summons by appropriate words that the summons is issued in a special proceeding and not in a civil action. The manner of service shall be as is prescribed for summons in civil actions by Rule 4 of the Rules of Civil Procedure: Provided, where the defendant is an agency of the federal government, or an agency of the State, or a local government, or an agency of a local government, the time for filing answer or other plea shall be within 30 days after the date of service of summons or after the final determination of any motion required to be made prior to the filing of an answer. (1868-9, c. 93, s. 4; Code, ss. 279, 287; Rev., ss. 711, 712; C. S., s. 753; 1927, c. 66, s. 5; 1929, c. 50; c. 237, s. 3; 1939, c. 49, s. 2; c. 143; 1951, c. 783; 1961, c. 363; 1967, c. 954, s. 3; 1971, c. 1093, s. 17.)

**Editor's Note.**— sentence.  
The 1971 amendment deleted “whether Stated in Boring v. Mitchell, 5 N.C. App.  
by the sheriff or by publication” following 550, 169 S.E.2d 79 (1969).  
“service” near the beginning of the last

**§ 1-399. Defenses pleaded; transferred to civil issue docket; amendments.**—In special proceedings a defendant or other party thereto may plead any equitable or other defense, or ask any equitable or other relief in the pleadings which it would be competent to ask in a civil action; and when such pleas are filed the clerk shall transfer the cause to the civil issue docket for trial during session upon all issues raised by the pleadings. The trial judge may, with a view to substantial justice between the parties, allow amendments to the pleadings and interpleas in behalf of any person claiming an interest in the property. (1903, c. 566; Rev., s. 717; C. S., s. 758; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, for “term” near the end of the first sentence.  
effective Oct. 1, 1971, substituted “session”



**§ 1-401. Clerk acts summarily; signing by petitioners; authorization to attorney.**

**Persons Affected Must Present Ex Parte Proceeding to Clerk.**—This section applies only when all persons to be affected present an ex parte proceeding to the clerk and he acts summarily. In that event all parties must sign the petition, or must sign and file with the clerk (1) a written application to be made petitioners or (2) a written authorization to the attorney, before the clerk may make any order or decree prejudicing

their rights. In re Johnson, 9 N.C. App. 102, 176 S.E.2d 31 (1970).

**Written Authorization Required Only When Attorney Signs for Petitioner.**—This section only requires written authorization when the attorney signs for a petitioner in the original petition. It does not apply where the original petition is signed by the parties themselves. In re Johnson, 277 N.C. 688, 178 S.E.2d 470 (1971).

**§ 1-403. Orders signed by judge.**—Every order or judgment in a special proceeding required to be made by a judge of the superior court, in or out of session, must be authenticated by his signature. (1868-9, c. 93, s. 5; 1872-3, c. 100; Code, s. 288; Rev., s. 722; C. S., s. 762; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term."

**§ 1-408. Action in which clerk may allow fees of commissioners; fees taxed as costs.**

**Allowance of Commissioners' Fee by Clerk of Superior Court.** — See opinion of Attorney General to Mr. Jacob C. Taylor, Clerk of Superior Court, Halifax, N.C., 1/6/70.

## SUBCHAPTER XIII. PROVISIONAL REMEDIES.

### ARTICLE 34.

#### *Arrest and Bail.*

**§ 1-409. Arrest only as herein prescribed.**

Cited in Earnhardt v. Earnhardt, 9 N.C. App. 213, 175 S.E.2d 744 (1970).

**§ 1-422. Notice of justification; new bail.**—On the receipt of notice of exception to the bail, the sheriff or defendant may, within 10 days thereafter, give to the plaintiff or his attorney notice of the justification of the same or other bondsmen (specifying the places of residence and occupation of the latter) before the court or judge, at a specified time and place; the time to be not less than five nor more than 10 days thereafter. In case other bondsmen are given, there must be a new bond, in the form hereinbefore prescribed. (C. C. P., s. 163; Code, s. 305; Rev., s. 741; C. S., s. 780; 1971, c. 268, s. 26.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "justice of the peace" following "court," in the first sentence.

**§ 1-424. Justification of bail.**—For the purpose of justification, each of the bail shall attend before the court or judge, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the court, or judge, in his discretion, may think proper. The examination must be reduced to writing and subscribed by the bail, if required by the plaintiff. (C. C. P., s. 165; Code, s. 307; Rev., s. 742; C. S., s. 782; 1971, c. 268, s. 27.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, deleted "or a justice of the peace" following "court or judge" near the beginning of the first sentence and substituted "or judge" for "judge or justice of the peace" near the end of the first sentence.

§ 1-425. **Allowance of bail.**—If the court or judge finds the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk. The sheriff is then exonerated from liability. (C. C. P., s. 166; Code, s. 308; Rev., s. 743; C. S., s. 783; 1971, c. 268, s. 28.)

**Editor's Note.** — The 1971 amendment, judge" for "judge or justice of the peace" effective July 1, 1971, substituted "or near the beginning of the section.

§ 1-428. **Bail substituted for deposit.**—If money is deposited, as provided in G.S. 1-426 and 1-427, bail may be given and justified upon notice according to law at any time before judgment. Thereupon the court or judge shall direct, in the order of allowance, that the money deposited be refunded by the sheriff or other officer to the defendant, and it shall be refunded accordingly. (C. C. P., s. 169; Code, s. 311; Rev., s. 746; C. S., s. 786; 1971, c. 268, § 29.)

**Editor's Note.** — The 1971 amendment, peace" near the beginning of the second effective July 1, 1971, substituted "court or sentence.  
judge" for "judge, court or justice of the

## ARTICLE 35.

### *Attachment.*

#### Part 1. General Provisions.

##### § 1-440.1. **Nature of attachment.**

**Cited in** *Palmer v. M.R.S. Dev. Corp.*, 9 N.C. App. 668, 177 S.E.2d 328 (1970).

§ 1-440.5. **By whom order issued; when and where; filing of bond and affidavit.**—(a) An order of attachment may be issued by

- (1) The clerk of the court in which the action has been, or is being, commenced, or by
- (2) A judge of the appropriate trial division, as authorized in subsection (b) of this section.

(b) An order of attachment issued by a judge may be issued as follows:

- (1) If the action has been or is being commenced in the Superior Court Division, a resident superior court judge of the district, or a judge regularly holding the superior courts of the district, may issue the order in open court or in chambers, in session or in vacation, and within or without the district. Any other judge holding a session of superior court in the county may issue the order in open court.
- (2) If the action has been or is being commenced in the District Court Division, the presiding judge, the chief district judge, or any district judge authorized by the chief to hear motions and enter interlocutory orders may issue the order in open court or in chambers, in session or in vacation.

(c) In those cases where the order of attachment is issued by the judge, such judge shall cause the bond required by G.S. 1-440.10 and the affidavit required by G.S. 1-440.11 to be filed promptly with the clerk of the court of the county in which the action is pending. (1947, c. 693, s. 1; 1971, c. 268, s. 30.)

**Editor's Note.**—

The 1971 amendment, effective July 1, 1971, rewrote subsections (a) and (b) and

deleted "superior" preceding "court" near the end of subsection (c).

§ 1-440.7. **Time within which service of summons or service by publication must be had.**—(a) When an order of attachment is issued before the summons is served.

- (1) If personal service within the State is to be had, such personal service



must be had within 30 days after the issuance of the order of attachment;

- (2) If such personal service within the State is not to be had,
- a. Service of the summons outside the State, in the manner provided by Rule 4(j)(9)a or b of the Rules of Civil Procedure, must be had within 30 days after the issuance of the order of attachment, or
  - b. Service by publication must be commenced not later than the thirty-first day after the issuance of the order of attachment. If publication is commenced, such publication must be completed as provided by Rule 4(j)(9)c of the Rules of Civil Procedure unless the defendant appears in the action or unless personal service is had on him within the State.

(1971, c. 1093, ss. 14, 15.)

**Editor's Note.—**

The 1971 amendment substituted "Rule 4(j)(9)" for "Rule (j)(1)" in subdivisions (a)(2)a and (a)(2)b.

As the rest of the section was not changed by the amendment, only subsection (a) is set out.

**§ 1-440.9. Authority of court to fix procedural details.**

**Court Has Authority to Dissolve Attachment after Order Not Carried Out.**—This Article does not specifically authorize the court to dissolve or dismiss an attachment when a plaintiff fails to carry out the court's order to increase the bond, but pursuant to the general authorization of this section to

fix all procedural details not specified elsewhere, and in aid of its own jurisdiction over the matter, we think the court has authority to dissolve an attachment after the court's lawful order has not been carried out. *Palmer v. M.R.S. Dev. Corp.*, 9 N.C. App. 668, 177 S.E.2d 328 (1970).

**Part 2. Procedure to Secure Attachment.**

**§ 1-440.10. Bond for attachment.**

**Plaintiffs Not Entitled to Jury Trial on Question of Increasing Bond.**—Plaintiffs in attachment were not entitled to a jury trial on the question of increasing the bond required by this section, the size of a plaintiff's bond not being within the "issues" envisioned by § 1-440.36(c). *Palmer v. M.R.S. Dev. Corp.*, 9 N.C. App. 668, 177 S.E.2d 328 (1970).

A judge of the superior court has author-

ity to require plaintiffs in attachment to increase their bond or have their attachment dismissed. *Palmer v. M.R.S. Dev. Corp.*, 9 N.C. App. 668, 177 S.E.2d 328 (1970).

And he has authority to dismiss the attachment by a second order when plaintiffs failed to post additional bond within the time fixed. *Palmer v. M.R.S. Dev. Corp.*, 9 N.C. App. 668, 177 S.E.2d 328 (1970).

**§ 1-440.13. Additional orders of attachment at time of original order; alias and pluries orders.**

**Levy Made under Original Order 41 Days after Issuance Is Invalid.**—Where the sheriff's levy was under the original order for attachment and was 41 days after its issuance, it was insufficient to constitute a

valid levy, and there was no error in the entry of the order to vacate it. *Robinson v. Robinson*, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

**Part 3. Execution of Order of Attachment; Garnishment.**

**§ 1-440.16. Sheriff's return.**

**Levy under an order of attachment must be made within ten days of the issuance of the order.** *Robinson v. Robinson*, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

**Levy Made under Original Order 41 Days after Issuance Is Invalid.**—Where the sheriff's levy was under the original order

for attachment and was 41 days after its issuance, it was insufficient to constitute a valid levy, and there was no error in the entry of the order to vacate it. *Robinson v. Robinson*, 10 N.C. App. 463, 179 S.E.2d 144 (1971).

## Part 5. Miscellaneous Procedure Pending Final Judgment.

**§ 1-440.36. Dissolution of the order of attachment.**

**Jurisdiction of Judge of Superior Court.** — On motion to dissolve an attachment, the judge of superior court has concurrent jurisdiction with the clerk of superior court to determine the matter; and consequently the judge is not limited to determining whether or not there was competent evidence to support the findings of the clerk but can consider the evidence de novo and hear evidence not before the clerk. *Hiscox v. Shea*, 8 N.C. App. 90, 173 S.E.2d 591 (1970).

**Failure of Judge to Make Findings of Fact.** — On appeal to the superior court from an order of the clerk dissolving an at-

tachment, failure of the judge to make findings of fact in his order which vacated and overruled the clerk's order is erroneous. *Hiscox v. Shea*, 8 N.C. App. 90, 173 S.E.2d 591 (1970).

**Plaintiffs Not Entitled to Jury Trial on Question of Increasing Bond.** — Plaintiffs in attachment were not entitled to a jury trial on the question of increasing the bond required by § 1-440.10, the size of a plaintiff's bond not being within the "issues" envisioned by subsection (c). *Palmer v. M.R.S. Dev. Corp.*, 9 N.C. App. 668, 177 S.E.2d 328 (1970).

**§ 1-440.40. Defendant's objection to bond or surety.**

A judge of the superior court has authority to require plaintiffs in attachment to increase their bond or have their attachment dismissed. *Palmer v. M.R.S. Dev. Corp.*, 9 N.C. App. 668, 177 S.E.2d 328 (1970).

And he has authority to dismiss the attachment by a special order when plaintiffs failed to post additional bond within the time fixed. *Palmer v. M.R.S. Dev. Corp.*, 9 N.C. App. 668, 177 S.E.2d 328 (1970).

## Part 6. Procedure after Judgment.

**§ 1-440.46. When plaintiff prevails in principal action.**

**Judgment against Defendant and Surety Proper.** — Where the bond signed by the surety was for the benefit of the plaintiff, and the judgment did not exceed the amount of the bond, the trial judge cor-

rectly gave judgment against the defendant and the surety. *Beck Distrib. Corp. v. Imported Parts, Inc.*, 10 N.C. App. 737, 179 S.E.2d 793 (1971).

## Part 7. Attachments in Justice of the Peace Courts.

§§ 1-440.47 to 1-440.56: Repealed by Session Laws 1971, c. 268, s. 34, effective July 1, 1971.

## Part 8. Attachment in Other Inferior Courts.

§ 1-440.57: Repealed by Session Laws 1971, c. 268, s. 34, effective July 1, 1971.

## ARTICLE 36.

*Claim and Delivery.*

**§ 1-479. Qualification and justification of defendant's sureties.**—The qualification of the defendant's sureties, and their justification, is as prescribed in respect to bail upon an order of arrest. The defendant's sureties, upon notice to the plaintiff of not less than two nor more than six days, shall justify before the court or judge, and upon this justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until justification is completed or expressly waived, and he may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff. (C. C. P., ss. 182, 183; Code, ss. 327, 328; Rev., ss. 796, 797; C. S., s. 837; 1971, c. 268, s. 30.1.)

**Editor's Note.** — The 1971 amendment, judge" for "a judge or justice of the peace" effective July 1, 1971, substituted "or in the second sentence.



**§ 1-482. Property claimed by third person; proceedings.**—When the property taken by the sheriff is claimed by any person other than the plaintiff or defendant the claimant may intervene upon filing an affidavit of his title and right to the possession of the property, stating the grounds of such right and title, and upon his delivering to the sheriff an undertaking in an amount double the value of the property specified in his affidavit, for the delivery of the property to the person entitled to it, and for the payment of all such costs and damages as may be awarded against him, this undertaking to be executed by one or more sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property. A copy of this undertaking and accompanying affidavit shall be served by the sheriff on the plaintiff and defendant at least 10 days before the return day of the summons in the action, when the court trying it shall order a jury to be impaneled to inquire in whom is the right to the property specified in plaintiff's complaint. The finding of the jury is conclusive as to the parties then in court, and the court shall adjudge accordingly, unless it is reversed upon appeal. However, this section shall not be construed to prevent any such intervener or third person from intervening and asserting his claim to the property, or any part thereof, without giving bond as herein required, where such intervener or other third person does not ask for possession of the property pending the trial of the issue. (1793, c. 389, s. 3, P. R.; R. C., c. 7, s. 10; C. C. P., s. 186; Code, s. 331; Rev., s. 800; 1913, c. 188; C. S., s. 840; 1933, c. 131; 1971, c. 268, s. 30.2.)

**Editor's Note.**—

The 1971 amendment, effective July 1, 1971, deleted a former fourth sentence and a portion of the last sentence, both

relating to proceedings in the court of a justice of the peace. The amendment also substituted "However," for "Provided that," at the beginning of the last sentence.

ARTICLE 37.

*Injunction.*

**§ 1-485. When preliminary injunction issued.**

**I. GENERAL CONSIDERATION.**

**References to Superior Court Deemed to Refer Also to District Court.** — Following the provisions of § 7A-193, the references in Chapter 1 of the General Statutes to the

superior court are deemed to refer also to the district court. *Boston v. Freeman*, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

**Cited in** *Town of Hillsborough v. Smith*, 10 N.C. App. 70, 178 S.E.2d 18 (1970).

**§ 1-493. What judges have jurisdiction.** — The judges of the superior court have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings. A judge holding a special session in any county may grant an injunction, or issue a restraining order, returnable before himself, in any case which he has jurisdiction to hear and determine under the commission issued to him, and the same is returnable as directed in the order. (1876-7, c. 223, ss. 1, 2; 1879, c. 63, ss. 1, 3; Code, s. 335; Rev., s. 814; C. S., s. 851; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" near the beginning of the second sentence.

**References to Superior Court Deemed to Refer Also to District Court** — Following

the provisions of § 7A-193, the references in Chapter 1 of the General Statutes to the superior court are deemed to refer also to the district court. *Boston v. Freeman*, 6 N.C. App. 736, 171 S.E.2d 206 (1969).

**§ 1-500. Restraining orders and injunctions in effect pending appeal; indemnifying bond.** — Whenever a plaintiff shall appeal from a judgment rendered at chambers, or in session, either vacating a restraining order theretofore granted, or denying a perpetual injunction in any case where such injunction is the principal relief sought by the plaintiff, and where it shall appear

that vacating said restraining order or denying said injunction will enable the defendant to consummate the threatened act, sought to be enjoined, before such appeal shall be finally disposed of: Provided, the plaintiff shall forthwith execute of any judgment of the appellate division, reversing the judgment of the lower court, then in such case the original restraining order granted in the case shall in the discretion of the trial judge be and remain in full force and effect until said appeal can be heard, so that the plaintiff will thereby be deprived of the benefits and deposit with the clerk a written undertaking with sufficient surety, approved by the clerk or judge, in an amount to be fixed by the judge to indemnify the party enjoined against all loss, not exceeding an amount to be specified, which he may suffer on account of continuing such restraining order as aforesaid, in the event that the judgment of the lower court is affirmed by the appellate division. (1921, c. 58; C. S., s. 858(a); 1969, c. 44, s. 12; 1971, c. 381, s. 12.)

**Editor's Note.—**

The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" near the beginning of the first sentence.

Cited in *Town of Hillsborough v. Smith*,

10 N.C. App. 70, 178 S.E.2d 18 (1970).

## ARTICLE 38.

### *Receivers.*

#### Part 1. Receivers Generally.

**§ 1-501. What judge appoints.**—Any judge of the superior or district court with authority to grant restraining orders and injunctions has like jurisdiction in appointing receivers, and all motions to show cause are returnable as is provided for injunctions, except only a judge of the Superior Court Division has jurisdiction to appoint receivers of corporations. (C. C. P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; Code, s. 379; Rev., s. 846; C. S., s. 859; 1971, c. 268, s. 31.)

**Cross References.—**

The first two cross references in this note in the Replacement Volume should be deleted.—Ed. note.

effective July 1, 1971, inserted "or district" near the beginning of the section and added the exception clause at the end of the section.

**Editor's Note.** — The 1971 amendment,

**§ 1-505. Sale of property in hands of receiver.**—In a case pending in the Superior Court Division in which a receiver has been appointed, the resident superior court judge or a superior court judge regularly holding the courts of the district shall have power and authority to order a sale of any property, real or personal, in the hands of a receiver duly and regularly appointed. In a case pending in the District Court Division in which a receiver has been appointed, the chief district judge or a district judge designated by the chief district judge to hear motions and enter interlocutory orders shall have the power and authority to order a sale of any property, real or personal, in the hands of a duly appointed receiver. Sales of property authorized by this section shall be upon such terms as appear to be to the best interests of the creditors affected by the receivership. The procedure for such sales shall be as provided in Article 29A of Chapter 1 of the General Statutes. (1931, c. 123, s. 1; 1949, c. 719, s. 2; 1955, c. 399, s. 1; 1971, c. 268, s. 32.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, rewrote the first sentence and added the second and third sentences.

#### Part 2. Receivers of Corporations.

**§ 1-507.7. Report on claims to court; exceptions and jury trial.**—It is the duty of the receiver to report to the session of the superior court subsequent to a finding by him as to any claim against the corporation, and exceptions there-



to may be filed by any person interested, within 10 days after notice of the finding by the receiver, and not later than within the first three days of the said term; and, if, on an exception so filed, a jury trial is demanded, it is the duty of the court to prepare a proper issue and submit it to a jury; and if the demand is not made in the exceptions to the report the right to a jury trial is waived. The judge may, in his discretion, extend the time for filing such exceptions. Provided, that no court shall issue any order of distribution or order of discharge of a receiver until said receiver has proved to the satisfaction of the court that written notice has been mailed to the last known address of every claimant who has properly filed claim with the receiver, to the effect that such orders will be applied for at a certain time and place therein set forth and by producing a receipt issued by the United States post office, showing that such notice has been mailed to each of such claimant's last known address at least 20 days prior to the time set for hearing and passing upon such application to the court for said orders of distribution and/or discharge. (1901, c. 2, s. 83; Rev., s. 1230; C. S., s. 1213; 1945, c. 219; 1955, c. 1371, s. 2; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, for "term" near the beginning of the first effective Oct. 1, 1971, substituted "session" sentence.

**§ 1-507.8. Property sold pending litigation.**—When the property of an insolvent corporation is at the time of the appointment of a receiver encumbered with mortgages or other liens, the legality of which is brought in question, and the property is of a character materially to deteriorate in value pending the litigation, the court may order the receiver to sell the same, clear of encumbrance, at public or private sale, for the best price that can be obtained, and pay the money into the court, there to remain subject to the same liens and equities of all parties in interest as was the property before sale to be disposed of as the court directs. And the receiver or receivers making such sale is hereby authorized and directed to report to the resident judge of the district or to the judge holding the courts of the district in which the property is sold, the said sale for confirmation, the said report to be made to the said judge in any county in which he may be at the time; but before acting upon said report, the said receiver or receivers shall publish in some newspaper published in the county or in some newspaper of general circulation in the county, where there is no newspaper published in the county, a notice directed to all creditors and persons interested in said property, that the said receiver will make application to the judge (naming him) at a certain place and time for the confirmation of his said report, which said notice shall be published at least 10 days before the time fixed therein for the said hearing. And the said judge is authorized to act upon said report, either confirming it or rejecting the sale; and if he rejects the sale it shall be competent for him to order a new sale and the said order shall have the same force and effect as if made at a regular session of the superior court of the county in which the property is situated. (1901, c. 2, s. 86; Rev., s. 1232; C. S., s. 1214; Ex. Sess. 1924, c. 13; 1955, c. 1371, s. 2; 1971, c. 381, s. 12.)

**Editor's Note.** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" in the last sentence.

## SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

### ARTICLE 41.

#### *Quo Warranto.*

#### **§ 1-514. Writs of sci. fa. and quo warranto abolished.**

**Editor's Note.**—

For article "Some Aspects of the Crimi-

nal Court Process in North Carolina," see 49 N.C.L. Rev. 469 (1971).

§ 1-521. **Trials expedited.**—All actions to try the title or right to any State, county or municipal office shall stand for trial at the next session of court after the summons and complaint have been served for 30 days, regardless of whether issues were joined more than 10 days before the session; and it is the duty of the judge to expedite the trial of these actions and to give them precedence over all others, civil or criminal. It is unlawful to appropriate any public funds to the payment of counsel fees in any such action. (1874-5, c. 173; Code, s. 616; 1901, c. 42; Rev., s. 833; C. S., s. 876; 1947, c. 781; 1971, c. 381, s. 12.)

**Editor's Note** — The 1971 amendment, effective Oct. 1, 1971, substituted "session" for "term" twice in the first sentence.

## ARTICLE 42.

### *Waste.*

§ 1-534. **For and against whom action lies.**—In all cases of waste, an action lies in the appropriate trial division of the General Court of Justice at the instance of him in whom the right is, against all persons committing the waste, as well tenant for term of life as tenant for term of years and guardians. (52 Hen. III, c. 23; 6 Edw. I, c. 5; 20 Edw. I, st. 2; 11 Hen. VI, c. 5; R. C., c. 116, s. 1; Code, s. 625; Rev., s. 854; C. S., s. 889; 1971, c. 268, s. 33.)

**Editor's Note.** — The 1971 amendment, effective July 1, 1971, substituted "appropriate trial division of the General Court of Justice" for "superior court."

## ARTICLE 43.

### *Nuisance and Other Wrongs.*

§ 1-539.1. **Damages for unlawful cutting or removal of timber; misrepresentation of property lines.**—(a) Any person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub or tree therefrom, shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed.

In addition to the damages provided in the preceding sentence, the bona fide owner may, upon a finding by the court that there was an unwarranted refusal by the defendant to pay the claim, recover a reasonable attorney's fee, reasonable surveying fee and the reasonable cost of an appraisal of the damages sustained by the bona fide owner, said attorney's fee, surveying fee and cost of appraisal to be determined by the trial judge and taxed as a part of the court cost.

(1971, c. 119.)

#### **Editor's Note.**—

The 1971 amendment added the second paragraph of subsection (a). The amendatory act provides that it shall not affect pending litigation.

As subsection (b) was not changed by the amendment, it is not set out.

**Applied** in *Pine Burr Golf, Inc. v. Poole*, 8 N.C. App. 92, 173 S.E.2d 478 (1970).

## ARTICLE 43A.

### *Adjudication of Small Claims in Superior Court.*

§§ 1-539.3 to 1-539.8: Repealed by Session Laws 1971, c. 268, s. 34, effective July 1, 1971.



## SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

## ARTICLE 44.

*Compromise.***§ 1-540.1. Effect of release of original wrongdoer on liability of physicians and surgeons for malpractice.**

This section on its face applies only to actions for personal injury. *Simmons v. Wilder*, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

Actions for wrongful death are not included in the terms of this section. *Simmons v. Wilder*, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

**Former Law.**—Prior to October 1, 1961, a release executed in favor of one responsible for the original injury protected a physician or surgeon against a claim based on negligent treatment of the injury. *Simmons v. Wilder*, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

**§ 1-540.3. Advance payments.**—(a) In any claim, potential civil action or action in which any person claims to have sustained bodily injuries, advance or partial payment or payments to any such person claiming to have sustained bodily injuries or to the personal representative of any person claimed to have sustained fatal injuries may be made to such person or such personal representative by the person or party against whom such claim is made or by the insurance carrier for the person, party, corporation, association or entity which is or may be liable for such injuries or death. Such advance or partial payment or payments shall not constitute an admission of liability on the part of the person, party, corporation, association or entity on whose behalf the payment or payments are made or by the insurance carrier making the payments. It shall be incompetent for any party in a civil action to offer into evidence, through any witness either by oral testimony or paper writing, the fact of the advance or partial payment or payments made by or on behalf of the opposing party. The receipt of the advance or partial payment or payments shall not in and of itself act as a bar, release, accord and satisfaction, or a discharge of any claims of the person or representative receiving the advance or partial payment or payments, unless by the terms of a properly executed settlement agreement it is specifically stated that the acceptance of said payment or payments constitutes full settlement of all claims and causes of action for personal injuries or wrongful death, as applicable.

(b) In any civil action for personal injuries or wrongful death the person or party against whom claim is made for such injuries or death and by or on whose behalf advance or partial payment or payments have been made to the party asserting the claim shall file with the Court and serve upon opposing counsel a motion setting out the date and amount of payment or payments and praying that said sums be credited upon any judgment recovered by the opposing party against the party on whose behalf the payment or payments were made. Prior to the entry of judgment, the trial judge shall conduct a hearing and may consider affidavits, oral testimony, depositions, and any other competent evidence, and shall enter his findings of fact and conclusions of law as to whether the advance or partial payment or payments were made by or on behalf of the person or party claiming to have made such payment(s) to the party asserting the claim for injuries or wrongful death. Upon a finding that the advance or partial payment or payments were made by or on behalf of the person or party claiming to have made such payment(s), all such payments shall be credited by the trial judge upon any judgment rendered in favor of the person or representative who received the payment or payments. Advance payments made by one joint tort-feasor shall not inure to the benefit or credit of any joint tort-feasor not making such payments.

No claim for reimbursement may be made or allowed by or on behalf of the person or party making such advance payment or payments against the person or party to whom such payment or payments are made except a claim based on fraud.

The making of any advance payment shall not affect in any way whatsoever the running of the statute of limitations. (1971, c. 854.)

ARTICLE 49.

*Time.*

**§ 1-593. How computed.**

Cited in *Robbins v. Bowman*, 9 N.C. App. 416, 176 S.E.2d 346 (1970).



## Chapter 1A.

### Rules of Civil Procedure.

#### § 1A-1. Rules of Civil Procedure.

##### ARTICLE 1.

##### *Scope of Rules—One Form of Action.*

#### **Rule 1. Scope of rules.**

These rules shall govern the procedure in the superior and district courts of the State of North Carolina in all actions and proceedings of a civil nature except when a differing procedure is prescribed by statute. They shall also govern the procedure in tort actions brought before the Industrial Commission except when a differing procedure is prescribed by statute. (1967, c. 954, s. 1; 1971, c. 818.)

##### **Editor's Note.—**

The 1971 amendment added the second sentence.

For article on the legislative changes to the new rules of civil procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

The North Carolina Rules of Civil Procedure are modeled after the federal rules. In most instances they are verbatim copies

with the same enumerations. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Inapplicability of Rule 62 to Summary Ejection.**—See opinion of Attorney General to Mr. Alton J. Knight, Clerk of Superior Court, Durham County, 1/30/70.

Cited in Hendrix v. Alsop, 10 N.C. App. 338, 178 S.E.2d 637 (1971).

##### ARTICLE 2.

##### *Commencement of Action; Service of Process, Pleadings, Motions, and Orders.*

#### **Rule 3. Commencement of action.**

This rule and Rule 65(b) must be construed in *pari materia*; procedure under Rule 65(b) is permissible only after an action is commenced as provided by this rule. Carolina Freight Carriers Corp. v. Local Union #61, 11 N.C. App. 159, 180 S.E.2d 461 (1971).

**Complaint or Summons as Condition Precedent to Issuance of Injunction.**—The filing of a complaint, or the issuance of summons pursuant to this rule, is a condition precedent to the issuance of an injunction or restraining order, and when a complaint is not filed or summons is not issued as provided in this rule, an action is not properly instituted and the court does not have jurisdiction. Carolina Freight Carriers Corp. v. Local Union #61, 11 N.C. App. 159, 180 S.E.2d 461 (1971).

Where there was no complaint, and

where the record failed to disclose that a summons was ever issued, the superior court did not have jurisdiction, and therefore the temporary restraining order was void, and disobedience of it was not punishable. Carolina Freight Carriers Corp. v. Local Union #61, 11 N.C. App. 159, 180 S.E.2d 461 (1971).

##### **Document Held Not to Be Complaint.**—

A document denominated an affidavit did not purport to be a complaint and could not be held to be one, because, among other things, (1) it was not properly captioned as required by Rule 10(a), (2) it was not signed by an attorney of record as required by Rule 11(a), and (3) there was no demand for relief made in the document as required by Rule 8(a)(2). Carolina Freight Carriers Corp. v. Local Union #61, 11 N.C. App. 159, 180 S.E.2d 461 (1971).

#### **Rule 4. Process.**

(j) *Process—manner of service to exercise personal jurisdiction.*—In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process shall be as follows:

- (1) Natural Person.—Except as provided in subsection (2) below, upon a natural person:

- a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein; or
- b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

(2) **Natural Person Under Disability.**—Upon a natural person under disability by serving process in any manner prescribed in this section (j) for service upon a natural person and, in addition, where required by paragraph a or b below, upon a person therein designated.

- a. Where the person under disability is a minor, process shall be served separately in any manner prescribed for service upon a natural person upon a parent or guardian having custody of the child, or if there be none, upon any other person having the care and control of the child. If there is no parent, guardian, or other person having care and control of the child when service is made upon the child, then service of process must also be made upon a guardian ad litem who has been appointed pursuant to Rule 17.
- b. If the plaintiff actually knows that a person under disability is under guardianship of any kind, process shall be served separately upon his guardian in any manner applicable and appropriate under this section (j). If the plaintiff does not actually know that a guardian has been appointed when service is made upon a person known to him to be incompetent to have charge of his affairs, then service of process must be made upon a guardian ad litem who has been appointed pursuant to Rule 17.

(3) **The State.**—Upon the State by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general.

(4) **An Agency of the State.**—

- a. Upon an agency of the State by personally delivering a copy of the summons and of the complaint to the process agent appointed by the agency in the manner hereinafter provided.
- b. Every agency of the State shall appoint a process agent by filing with the Attorney General the name and address of an agent upon whom process may be served.
- c. If any agency of the State fails to comply with paragraph b above, then service upon such agency may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or to a deputy or assistant attorney general.
- d. For purposes of this rule, the term "agency of the State" includes every agency, institution, board, commission, bureau, department, division, council, member of Council of State, or officer of the State government of the State of North Carolina, but does not include counties, cities, towns, villages, other municipal corporations or political subdivisions of the State, county or city boards of education, other local public districts, units, or bodies of any kind, or private corporations created by act of the General Assembly.



## (5) Counties, Cities, Towns, Villages and Other Local Public Bodies.—

- a. Upon a city, town, or village by personally delivering a copy of the summons and of the complaint to its mayor, city manager or clerk.
- b. Upon a county by personally delivering a copy of the summons and of the complaint to its county manager or to the chairman, clerk or any member of the board of commissioners for such county.
- c. Upon any other political subdivision of the State, any county or city board of education, or other local public district, unit, or body of any kind (i) by personally delivering a copy of the summons and of the complaint to an officer or director thereof, or (ii) by personally delivering a copy of the summons and of the complaint to an agent or attorney in fact authorized by appointment or by statute to be served or to accept service in its behalf.
- d. In any case where none of the officials, officers or directors specified in paragraphs a, b and c can, after due diligence, be found in the State, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof, such court or judge may grant an order that service upon the party sought to be served may be made by personally delivering a copy of the summons and of the complaint to the Attorney General or any deputy or assistant attorney general of the State of North Carolina.

## (6) Domestic or Foreign Corporation.—Upon a domestic or foreign corporation:

- a. By delivering a copy of the summons and of the complaint to an officer, director, or managing agent of the corporation or by leaving copies thereof in the office of such officer, director, or managing agent with the person who is apparently in charge of the office; or
- b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to accept service or process or by serving process upon such agent or the party in a manner specified by any statute.

## (7) Partnerships.—Upon a general or limited partnership:

- a. By delivering a copy of the summons and of the complaint to any general partner, or to any attorney in fact or agent authorized by appointment or by law to be served or to accept service of process in its behalf or by leaving copies thereof in the office of such general partner, attorney in fact or agent with the person who is apparently in charge of the office.
- b. If relief is sought against a partner specifically, a copy of the summons and of the complaint must be served on such partner as provided in this section (j).

## (8) Other Unincorporated Associations and Their Officers.—Upon any unincorporated association, organization, or society other than a partnership:

- a. By delivering a copy of the summons and of the complaint to an officer, director, managing agent or member of the governing body of the unincorporated association, organization or society, or by leaving copies thereof in the office of such officer, director, managing agent or member of the governing body with the person who is apparently in charge of the office; or
- b. By delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to be served or to

accept service of process or by serving process upon such agent or the party in a manner specified by any statute.

(9) Alternative Method of Service on Party That Cannot Otherwise Be Served or Is Not Inhabitant of or Found Within State.—Any party that cannot after due diligence be served within this State in the manner heretofore prescribed in this section (j), or that is not an inhabitant of or found within this State, or is concealing his person or whereabouts to avoid service of process, or is a transient person, or one whose residence is unknown, or is a corporation incorporated under the laws of any other state or foreign country and has no agent authorized by such corporation to be served or to accept service of process, service upon the defendant may be made in the following manner:

- a. Personal service outside State.—Personal service may be made on any party outside this State by anyone authorized by section (a) of this rule and in the manner prescribed in this section (j) for service on such party within this State. Before judgment by default may be had on such service, there shall be filed with the court an affidavit of service showing the circumstances warranting the use of personal service outside this State and proof of such service in accordance with the requirements of G.S. 1-75.10(1).
- b. Registered mail.—Any party subject to service of process under this subsection (9) may be served by mailing a copy of the summons and complaint, registered mail, return receipt requested, addressed to the party to be served. Service shall be complete on the day the summons and complaint are delivered to the addressee, but the court in which the action is pending shall, upon motion of the party served, allow such additional time as may be necessary to afford the defendant reasonable opportunity to defend the action. Before judgment by default may be had on such service, the serving party shall file an affidavit with the court showing the circumstances warranting the use of service by registered mail and averring (i) that a copy of the summons and complaint was deposited in the post office for mailing by registered mail, return receipt requested, (ii) that it was in fact received as evidenced by the attached registry receipt or other evidence satisfactory to the court of delivery to the addressee and (iii) that the genuine receipt or other evidence of delivery is attached. This affidavit shall be prima facie evidence that service was made on the date disclosed therein in accordance with the requirements of this paragraph, and shall also constitute the method of proof of service of process when the party appears in the action and challenges such service upon him.
- c. Service by publication.—A party subject to service of process under this subsection (9) may be served by publication whenever the party's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained, or there has been a diligent but unsuccessful attempt to serve the party under either paragraph a or under paragraph b or under paragraphs a and b of this subsection (9). Service of process by publication shall consist of publishing a notice of service of process by publication in a newspaper qualified for legal advertising in accordance with G.S. 1-597, 1-598, and published in the county where the action is pending or, if no qualified newspaper is published in such county, then in a qualified newspaper published in an adjoining county, or in a



county in the same judicial district, once a week for three successive weeks. If the party's post-office address is known or can with reasonable diligence be ascertained, there shall be mailed to the party at or immediately prior to the first publication a copy of the notice of service of process by publication. The mailing may be omitted if the post-office address cannot be ascertained with reasonable diligence. Upon completion of such service there shall be filed with the court an affidavit showing the publication and mailing in accordance with the requirements of G.S. 1-75.10(2) and the circumstances warranting the use of service by publication.

The notice of service of process by publication shall (i) designate the court in which the action has been commenced and the title of the action which title may be indicated sufficiently by the name of the first plaintiff and the first defendant; (ii) be directed to the defendant sought to be served; (iii) state either that a pleading seeking relief against the person to be served has been filed or has been required to be filed therein not later than a date specified in the notice; (iv) state the nature of the relief being sought; (v) require the defendant being so served to make defense to such pleading, within 40 days after a date stated in the notice, exclusive of such date, which date so stated shall be the date of the first publication of notice, or the date when the complaint is required to be filed, whichever is later, and notify the defendant that upon his failure to do so the party seeking service of process by publication will apply to the court for the relief sought; (vi) be subscribed by the party seeking service or his attorney and give the post-office address of such party or his attorney; and (vii) be substantially in the following form:

NOTICE OF SERVICE OF PROCESS BY PUBLICATION  
STATE OF NORTH CAROLINA  
..... COUNTY

In the ..... Court

[Title of action or special proceeding] To [Person to be served]:

Take notice that A pleading seeking relief against you (has been filed) (is required to be filed not later than ....., 19....) in the above-entitled (action) (special proceeding). The nature of the relief being sought is as follows: (State nature.)

You are required to make defense to such pleading not later than (..... 19....) and upon your failure to do so the party seeking service against you will apply to the court for the relief sought.

This, the ..... day of ....., 19....

..... (Attorney) (Party)  
..... (Address)

- d. Alternative provisions for service in a foreign country.—Where service under this subsection (9) is to be effected upon a party in a foreign country, in the alternative service of the summons and complaint may be made (i) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (ii) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (iii) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery

to an officer or a managing or general agent; or (iv) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (v) as directed by order of the court. Service under (iii) or (v) may be made by any person authorized by section (a) of this rule or who is designated by order of the court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service. Proof of service may be made as prescribed in G.S. 1-75.10, the order of the court or paragraph b hereof, in which case there shall be included an affidavit or certificate of addressing and mailing by the clerk of the court, or by the law of the foreign country.

- e. Attack on judgment by default.—No party served under this subsection (9) may attack any judgment by default entered on such service on the ground that service, as required by this section (j), should or could have been effected, with or without due diligence, under some other subsection of this section (j) or under a different paragraph of this subsection (9).

(j1) *Personal jurisdiction by acceptance of service.*—Any party personally, or through the persons provided in Rule 4(j), may accept service of process by notation of acceptance of service together with the signature of the party accepting service and the date thereof on an original or copy of a summons, and such acceptance shall have the same force and effect as would exist had the process been served by delivery of copy and summons and complaint to the person signing said acceptance.

(1971, c. 962; c. 1156, s. 2.)

**Editor's Note.—**

The first 1971 amendment added section (j1).

The second 1971 amendment substituted "such corporation" for "appointment or by law" near the end of the introductory language of subsection (9) of section (j).

As the rest of this rule was not changed by the amendments, only sections (j) and (j1) are set out.

For article on the legislative changes to the new rules of civil procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970). For note on constitutionality of constructive service of process on missing defendants, see 48 N.C.L. Rev. 616 (1970). For article on modern statutory approaches to service of process outside the state, see 49 N.C.L. Rev. 235 (1971).

**Purpose of Service, etc.—**

In accord with original. See *Farr v. City*

of Rocky Mount, 10 N.C. App. 128, 177 S.E.2d 763 (1970).

**Service of Process upon Defendant in Divorce Action by Leaving Copies with Defendant's Mother at the Defendant's Address Is Sufficient Service and Is Sufficient for Nonjury Trial.**—See opinion of Attorney General to Honorable John S. Gardner, District Court Judge, Sixteenth Judicial District, 41 N.C.A.G. 473 (1971).

**Provisions of Rule 4(j)(9)b for Service of Process by Registered Mail Not "Personal Service" for Purposes of Waiving Jury Trial in Divorce Actions.**—See opinion of Attorney General to Honorable Tom H. Matthews, District Court Judge, Seventh Judicial District, 4/27/70.

**Quoted in** *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

**Cited in** *Crabtree v. Coats & Burchard Co.*, 7 N.C. App. 624, 173 S.E.2d 473 (1970).

## Rule 5. Service and filing of pleadings and other papers.

(b) *Service—how made.*—A pleading setting forth a counterclaim or crossclaim shall be filed with the court and a copy thereof shall be served on the party against whom it is asserted or on his attorney of record. With respect to all pleadings subsequent to the original complaint and other papers required or permitted to be served, service with due return may be made in the manner provided for service and return of process in Rule 4 and may be made upon either the party or, unless service upon the party himself is ordered by the court, upon his attorney of record. With respect to such other pleadings and papers, service upon the attorney or upon



a party may also be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, by filing it with the clerk of court. Delivery of a copy within this rule means handing it to the attorney or to the party; or leaving it at the attorney's office with a partner or employee. Service by mail shall be complete upon deposit of the pleading or paper enclosed in a post-paid, properly addressed wrapper in a post office or official depository under the exclusive care and custody of the United States Postal Service.

(1971, c. 538; c. 1156, s. 2.5.)

**Editor's Note.** — The first 1971 amendment, effective Jan. 1, 1972, deleted "in the manner provided for service of process in Rule 4" at the end of the first sentence of section (b), deleted the former second sentence of section (b), which read "Written return shall be made by the officer making or attempting to make service thereof, but failure to make return shall not invalidate the service," and deleted "other" preceding "pleadings" near the beginning of the present second sentence of section (b).

The second 1971 amendment substituted "Postal Service" for "Post Office Department" in the fifth sentence of section (b).

As the rest of this rule was not changed by the amendments only section (b) is set out.

**Defendant's written motion to set aside a default judgment** is not one which might be heard ex parte. *Doxol Gas of Angier, Inc. v. Barefoot*, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

## Rule 6. Time.

**Editor's Note.**—

For article on modern statutory approaches to service of process outside the state, see 49 N.C.L. Rev. 235 (1971).

**A party entitled to notice of a motion may waive such notice.** *Brandon v. Brandon*, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

**And ordinarily does this by attending the hearing** of the motion and participating in it. *Brandon v. Brandon*, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

**Parent Ordinarily Entitled to Five Days' Notice of Custody Hearing.**—Ordinarily a parent is entitled to at least five days' notice (an intervening Saturday or Sunday excluded) of a hearing involving the custody of a child. *Brandon v. Brandon*, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

**But this is not an absolute right**, and is subject to the rule relating to waiver of notice and to the rule that a new trial will not be granted for mere technical error which could not have affected the result, but only for error which is prejudicial, amounting to the denial of a substantial right. *Brandon v. Brandon*, 10 N.C. App. 457, 179 S.E.2d 177 (1971).

**Notice for Hearing on Issue of Incompetency.**— Five days' notice would be appropriate for hearing on the issue of incompetency when appointment of a guardian ad litem is proposed, unless the court, for good cause, should prescribe a shorter period. *Rutledge v. Rutledge*, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

## ARTICLE 3.

### *Pleadings and Motions.*

## Rule 7. Pleadings allowed; form of motions.

(a) *Pleadings.*—There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a crossclaim, if the answer contains a crossclaim; a third-party complaint if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. If the answer alleges contributory negligence, a party may serve a reply alleging last clear chance. No other pleading shall be allowed except that the court may order a reply to an answer or a third-party answer.

(1971, c. 1156, s. 1.)

**Editor's Note.**—

The 1971 amendment added the second sentence in section (a).

As the rest of this rule was not changed

by the amendment, only section (a) is set out.

**Concept of "Defective Statement of a Good Cause of Action" Abolished.**—When

section (c) of this rule abolished demurrers and decreed that pleas "for insufficiency shall not be used," it also abolished the concept of "a defective statement of a good cause of action." *Cassels v. Ford Motor Co.*, 10 N.C. App. 51, 178 S.E.2d 12 (1970).

**Thus, Motion to Dismiss May Be Interposed to Defective Claim.** — Generally speaking, the motion to dismiss under Rule 12(b)(6) may be successfully interposed to a complaint which states a defective claim or cause of action. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

**But Not to Defective Statement of Good Claim.**—The motion to dismiss under Rule 12(b)(6) may not be successfully interposed to a complaint which was formerly labeled a "defective statement of a good cause of action." For such complaint, other provisions of Rule 12, the rules governing discovery, and the motion for summary judgment provide procedures adequate to

supply information not furnished by the complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Sufficiency of Complaint to Withstand Motion to Dismiss.**—A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint, and where allegations contained therein are sufficient to give the defendant sufficient notice of the nature and basis of the plaintiff's claim to enable him to answer and prepare for trial. *Cassels v. Ford Motor Co.*, 10 N.C. App. 51, 178 S.E.2d 12 (1970).

**Quoted in** *Doxol Gas of Angier, Inc. v. Barefoot*, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

**Cited in** *North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 180 S.E.2d 818 (1971).

## Rule 8. General rules of pleadings.

### Editor's Note.—

For note on specificity in pleading under North Carolina Rule 8(a)(1), see 48 N.C.L. Rev. 636 (1970).

**This rule replaces former § 1-122**, which provided that the complaint must contain a plain and concise statement of the facts constituting a cause of action. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Concept of "Notice Pleading" Adopted.**—By repealing § 1-122, which required a complaint to state "the facts constituting a cause of action," and substituting in lieu thereof the requirement that a "claim for relief" shall be stated with sufficient particularity to give notice of the events intended to be proved showing that the pleader is entitled to relief, the legislature intended to relax somewhat the strict requirements of detailed fact pleading and to adopt the concept of "notice pleading." *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

By repealing the section which required a complaint to state "the facts constituting a cause of action," and substituting in lieu thereof the requirement that a "claim for relief" shall be stated with sufficient particularity to give notice of the events intended to be proved showing that the pleader is entitled to relief, the legislature obviously intended to change prior law. Its choice of "new semantics" was neither accidental or casual. Considering the inspiration, origin, and legislative history of the Rules of Civil Procedure, and the absence of the word "facts" and the phrase "facts constituting a cause of action," the legislature intended to relax somewhat the strict requirements of detailed fact pleading and to adopt the con-

cept of "notice pleading." *Redevelopment Comm'n v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971).

**Detailed Fact Pleading No Longer Required.** — Under the "notice theory" of pleading contemplated by section (a)(1), detailed fact pleading is no longer required. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970); *Cassels v. Ford Motor Co.*, 10 N.C. App. 51, 178 S.E.2d 12 (1970).

**Sufficiency of Pleading under Notice Theory.** — A pleading complies with this rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pre-trial discovery—to get any additional information he may need to prepare for trial. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970); *Cassels v. Ford Motor Co.*, 10 N.C. App. 51, 178 S.E.2d 12 (1970).

Under the "notice theory of pleading" a statement of claim is adequate if it gives sufficient notice of the claim asserted, to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to show the type of case brought. *Redevelopment Comm'n v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971).

The allegations of the verified complaint were sufficiently particular as required by this rule to give the defendant notice of the transactions and occurrences intended to be proved and the type of relief demanded. *North Am. Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 181 S.E.2d 794 (1971).



**Claim for relief and basis for defense must still satisfy requirements of substantive law** which give rise to the pleadings, and no amount of liberalization should seduce the pleader into failing to state enough to give the substantive elements of his claim or of his defense. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Mere vagueness or lack of detail is not ground for a motion to dismiss.** Such a deficiency should be attacked by a motion for a more definite statement. *Redevelopment Comm'n v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971).

**Notice Theory Does Not Necessarily Require Full-Blown Trial.** — The notice theory of pleading does not necessarily mean that there must be a full-blown trial. Utilizing the facility of pre-trial discovery, the real facts can be ascertained and by motion for summary judgment (or other suitable device) the trial court can determine whether as a matter of law there is any right of recovery on those facts. *Sutton v. Duke*, 277 N.C. App. 94, 176 S.E.2d 161 (1970).

**Specificity Requirements of Section (a)(1) and Corresponding Federal and New York Rules Compared.** — The difference in the degree of specificity required by this rule, the New York Civil Practice Law and Rules, and the federal rules cannot be formularized. It is best realized by a comparison of the various forms of complaint illustrating the respective rules. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

The portion of section (a)(1) not included in federal Rule 8(a)(2) was probably taken from New York Civil Practice Law and Rules § 3013. Section 3013 says: Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and "the material elements of each cause of action or defense." The preceding words in quotes were omitted from section (a)(1) of this rule and constitute the difference between it and the New York section. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

The only appreciable difference between this rule and New York Civil Practice Law and Rules § 3013 is the latter's additional requirement that the statement of claim shall also give notice of "the material elements of each cause of action or defense." No doubt the draftsmen omitted the "material elements" requirement from this rule in an effort to discourage a judicial construction which would retain the former rule that the cause of action consists of

facts alleged. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Section (a)(1) Requires More Specificity than Corresponding Federal Rule.** — Under the directive of section (a)(1) a complaint need not be as specific as under former practice, but it must be to some degree more specific than the federal complaint. The added degree of specificity is not readily determinable from the language of the rule itself. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

Section (a)(1) differs from corresponding federal Rule 8(a)(2) in that the latter requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

The additional requirements in section (a)(1) manifest the legislative intent to require a more specific statement, or notice in more detail, than federal Rule 8(a)(2) requires. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Value of Precedent under New York and Federal Rules.** — The variant language in the North Carolina, New York, and federal rules prevents the assumption that the legislature adopted section (a)(1) with the judicial construction which had been placed upon either the New York or the federal counterpart. All changes in words and phrasing in a statute adopted from another state or country will be presumed deliberately made with the purpose to limit, qualify, or enlarge the adopted rule. This is not to say, however, that the "sizeable body of case law" which the federal rules and the New York rules have produced should be ignored. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Rules Do Not Prevent Detailed Pleading.** — There is nothing in the rules to prevent detailed pleading if the pleader deems it desirable. He may plead enough facts to prevent the invocation of discovery devices or the use of motions for more definite statement. Such a complaint could clearly identify the issues since Rule 10(b) requires the claim or claims to be averred in numbered paragraphs. In other words, there is nothing to prevent skillful and candid pleaders from meeting head-on in the pleadings. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Phrases "Cause of Action" and "Claim for Relief" Not Substantially Different.** — Neither the North Carolina nor the federal rules incorporate the phrase "cause of action." However, in the manner of their use, there is no substantial difference in the meaning of "cause of action" and "claim



for relief." *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Pleading Technicalities Identified with "Cause of Action" Rejected.** — The use of the "claim for relief" phrase in the federal rules was not a rejection of "cause of action" as such, but rather a rejection of pleading technicalities identified with "cause of action" (technicalities such as "evidence" or "ultimate facts," "conclusions" or "facts sufficient to constitute a cause of action"). *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

**One of the objectives sought to be attained by enactment of section (a)(1) of this rule** was to eliminate the sometimes troublesome and often sterile discussion as to whether a particular allegation states an "ultimate" fact or an "evidentiary" fact or conclusion of law. *Hoover v. Hoover*, 9 N.C. App. 310, 176 S.E.2d 10 (1970).

**A petition to condemn land for urban renewal** is sufficient under the Rules of Civil Procedure to state a claim for relief, where it gives notice of the nature and basis of the petitioners' claim and the type of case brought, and alleges generally the occurrence or performance of the conditions precedent required by Chapter 160, Article 37 and Chapter 40, Article 2. *Redevelopment Comm'n v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971).

**Averments in pleadings are admitted when not denied in a responsive pleading**, if a responsive pleading is required. *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

The defendant, by failing to answer, admitted that plaintiff was entitled to the possession of the real property. The default was thus established. *North Am. Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

**Admissions in the pleadings and stipulations by the parties** have the same effect as a jury finding; the jury is not required to find the existence of such facts; and nothing

else appearing, they are conclusive and binding upon the parties and the trial judge. *Crowder v. Jenkins*, 11 N.C. App. 57, 180 S.E.2d 482 (1971).

An admission in a pleading or a stipulation admitting a material fact becomes a judicial admission in a case and eliminates the necessity of submitting an issue in regard thereto to the jury. *Crowder v. Jenkins*, 11 N.C. App. 57, 180 S.E.2d 482 (1971).

**Failure to Plead Defense which Must Be Plead.** — Where the defendant does not raise the defense of the statute of frauds, one of the affirmative defenses which must be pleaded, in his pleadings or in the trial, he cannot present it on appeal. *Grissett v. Ward*, 10 N.C. App. 685, 179 S.E.2d 867 (1971).

**A pleading cannot give notice of occurrences that take place a year after the pleading is filed.** *Gordon v. Gordon*, 7 N.C. App. 206, 171 S.E.2d 805 (1970).

**Sufficiency of Amendment where Demurrer to Original Complaint Sustained under Prior Practice.** — Where a demurrer to the original complaint was sustained under former § 1-122(2), and motion to dismiss the amended complaint for failure to state a claim for relief was filed after the effective date of the new Rules of Civil Procedure, the sufficiency of the amended complaint was tested against the standard provided in section (a)(1) of this rule, and the order sustaining the demurrer to the original complaint could not be res judicata when considering the question of the sufficiency of the amended complaint under the new rule. *Hoover v. Hoover*, 9 N.C. App. 310, 176 S.E.2d 10 (1970).

**Applied in** *Carolina Freight Carriers Corp. v. Local Union #61*, 11 N.C. App. 159, 180 S.E.2d 461 (1971).

**Quoted in** *Ketner v. Rouzer*, 11 N.C. App. 483, 182 S.E.2d 21 (1971).

**Cited in** *Brewer v. Harris*, 10 N.C. App. 515, 179 S.E.2d 160 (1971).

## Rule 9. Pleading special matters.

**Conditions Precedent in Action to Condemn Land for Urban Renewal.** — A petition to condemn land for urban renewal is sufficient under the Rules of Civil Procedure to state a claim for relief, where it gives notice of the nature and basis of the petitioners' claim and the type of case brought, and alleges generally the occurrence or performance of the conditions precedent required by Chapter 160, Article 37 and Chapter 40, Article 2. *Redevelopment Comm'n v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971).

**Special damage, as that term is used in the law of defamation, means pecuniary**

loss, as distinguished from humiliation. *Williams v. Rutherford Freight Lines*, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

**Generally, Private or Local Act Must Be Pled by Title or Day of Ratification.** — As a general rule, a court will not take judicial notice of a private or local act unless it is pled by reference to its title or the day of its ratification; and this is true even though the act is published among the public laws. *Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E.2d 813 (1971).

**But this rule is one of pleading.** *Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E.2d 813 (1971).



**It Is Designed to Prevent Surprise.** — This rule is designed and intended primarily to prevent a litigant from being taken by surprise. *Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E.2d 813 (1971).

**And Should Not Prevail when Act Formally Brought to Attention of Court**

**and All Parties.**—This rule should never be allowed to prevail when a statute which effectually settles the controversy has been formally brought to the attention of the court and all parties. *Bland v. City of Wilmington*, 278 N.C. 657, 180 S.E.2d 813 (1971).

## Rule 10. Form of pleadings.

**Applied** in *Carolina Freight Carriers Corp. v. Local Union #61*, 11 N.C. App. 159, 180 S.E.2d 461 (1971).

**Stated** in *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

## Rule 11. Signing and verification of pleadings.

### Cross References.—

For requirement that complaint in secondary action by shareholders shall be verified by oath, see Rule 23. For provision requiring affidavit or verified complaint for temporary restraining order, see Rule 65. As to affidavit for arrest in civil action, see § 1-411. As to affidavit or verified complaint for attachment, see § 1-440.11. As to affidavit for claim and delivery, see § 1-473.

**Verification by Agent or Attorney Not Specifically Required.** — Section (c) sets forth the circumstances and the manner in

which pleadings may be verified by an agent or attorney of a party when the action or defense is founded upon a written instrument for the payment of money only, but it does not specifically require verification. *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

**Applied** in *Carolina Freight Carriers Corp. v. Local Union #61*, 11 N.C. App. 159, 180 S.E.2d 461 (1971).

**Cited** in *Young v. Marshburn*, 10 N.C. App. 729, 180 S.E.2d 43 (1971).

## Rule 12. Defenses and objections — when and how presented — by pleading or motion—motion for judgment on pleading.

(a) (1) **When Presented.**—A defendant shall serve his answer within 30 days after service of the summons and complaint upon him. A party served with a pleading stating a crossclaim against him shall serve an answer thereto within 30 days after service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 30 days after service of the answer or, if a reply is ordered by the court, within 30 days after service of the order, unless the order otherwise directs. Service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court:

- a. The responsive pleading shall be served within 20 days after notice of the court's action in ruling on the motion or postponing its disposition until the trial on the merits;
- b. If the court grants a motion for a more definite statement, the responsive pleading shall be served within 20 days after service of the more definite statement.

(2) **Cases Removed to United States District Court.**—Upon the filing in a district court of the United States of a petition for the removal of a civil action or proceeding from a court in this State and the filing of a copy of the petition in the State court, the State court shall proceed no further therein unless and until the case is remanded. If it shall be finally determined in the United States courts that the action or proceeding was not removable or was improperly removed, or for other reason should be remanded, and a final order is entered remanding the action or proceeding to the State court, the defendant or defendants, or any other party who would have been permitted or required to file a pleading had the proceedings to remove not been instituted, shall have 30 days after the filing in such State court of a certified

copy of the order of remand to file motions and to answer or otherwise plead.

(1971, c. 1236.)

**Editor's Note.** — The 1971 amendment, in subsection (a)(1)a, deleted "If the court denies the motion or postpones its disposition until the trial on the merits" preceding "The responsive pleading" and added "in ruling on the motion or postponing its disposition until the trial on the merits."

As the rest of this rule was not changed by the amendment, only section (a) is set out.

For note on specificity in pleading under North Carolina Rule 8 (a)(1), see 48 N.C.L. Rev. 636 (1970).

**Section (b) of this rule is essentially a verbatim copy of federal Rule 12(b).** Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Motion under Section (b) (6) Is Modern Equivalent of Demurrer.**—A motion to dismiss for failure to state a claim upon which relief can be granted is the modern equivalent of a demurrer. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970); Green v. Best, 9 N.C. App. 599, 176 S.E.2d 853 (1970).

**Thus, Demurrer Can Be Treated as Motion under Section (b) (6).**—The demurrer can be treated as a motion to dismiss under section (b)(6) of this rule, and it can be considered whether a plaintiff has stated in his complaint "a claim upon which relief can be granted." Green v. Best, 9 N.C. App. 599, 176 S.E.2d 853 (1970).

The trial court did not err in considering demurrers filed prior to the effective date of the new Rules of Civil Procedure as motions under section (b)(6) of this rule where plaintiff was not taken by surprise because the grounds stated in the demurrers were grounds covered by the rule. Hodges v. Wellons, 9 N.C. App. 152, 175 S.E.2d 690 (1970).

**And Court of Appeals Will Treat Motion under Section (b) (6) as Demurrer.**—Until Rule 4 of the Rules of Practice in the Court of Appeals is rewritten to conform with the Rules of Civil Procedure, a motion to dismiss under section (b)(6) should be treated as a demurrer. Green v. Best, 9 N.C. App. 599, 176 S.E.2d 853 (1970).

**Thus, Court of Appeals Will Not Entertain Appeal from Denial of Such Motion.**—Until Rule 4 of the Rules of Practice in the Court of Appeals is rewritten to conform with the Rules of Civil Procedure, the Court of Appeals will not entertain an appeal from an order denying a motion under section (b)(6), subject to the right of the

movant to petition for certiorari as envisioned by said Rule 4. Green v. Best, 9 N.C. App. 599, 176 S.E.2d 853 (1970).

The Court of Appeals will not entertain an appeal from an order denying defendant's motion to dismiss plaintiff's complaint for failure of the complaint to state a cause of action upon which relief can be granted; the defendant's remedy is to petition for writ of certiorari. Green v. Best, 9 N.C. App. 599, 176 S.E.2d 853 (1970).

**Motion to Dismiss under Section (b) (6) Performs Same Function as Demurrer.**—The motion to dismiss under section (b)(6) performs substantially the same function as the old common-law general demurrer. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

A motion under section (b)(6) of this rule performs substantially the same function as a demurrer for failure to state facts sufficient to constitute a cause of action. Hodges v. Wellons, 9 N.C. App. 152, 175 S.E.2d 690 (1970).

**And Will Only Be Allowed when Demurrer Would Have Been Sustained.**—The motion to dismiss will only be allowed when, under the former practice, a demurrer would have been sustained because the complaint affirmatively disclosed that the plaintiff had no cause of action against the defendant. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

**The test on a motion to dismiss for failure to state a claim upon which relief can be granted is whether the pleading is legally sufficient.** Alltop v. J.C. Penney Co., 10 N.C. App. 692, 179 S.E.2d 885 (1971).

A motion to dismiss is the usual and proper method of testing the legal sufficiency of the complaint. Sutton v. Duke, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Sufficiency of Complaint.**—A complaint is sufficient to withstand a motion to dismiss where no insurmountable bar to recovery on the claim alleged appears on the face of the complaint and where allegations contained therein are sufficient to give a defendant sufficient notice of the nature and basis of plaintiff's claim to enable him to answer and prepare for trial. Cassels v. Ford Motor Co., 10 N.C. App. 51, 178 S.E.2d 12 (1970).

Under the "notice theory of pleading" a statement of claim is adequate if it gives sufficient notice of the claim asserted to enable the adverse party to answer and prepare for trial, to allow for the application of the doctrine of res judicata, and to



show the type of case brought. Mere vagueness or lack of detail is not ground for a motion to dismiss. Such a deficiency should be attacked by a motion for a more definite statement. *Redevelopment Comm'n v. Grimes*, 277 N.C. 634, 178 S.E.2d 345 (1971).

**Concept of "Defective Statement of a Good Cause of Action" Abolished.**—When Rule 7(c) abolished demurrers and decreed that pleas "for insufficiency shall not be used," it also abolished the concept of "a defective statement of a good cause of action." *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970); *Cassels v. Ford Motor Co.*, 10 N.C. App. 51, 178 S.E.2d 12 (1970).

**Thus, Motion to Dismiss May Be Successfully Interposed to Defective Claim.**—Generally speaking, the motion to dismiss under section (b)(6) of this rule may be successfully interposed to a complaint which states a defective claim or cause of action. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970); *Cassels v. Ford Motor Co.*, 10 N.C. App. 51, 178 S.E.2d 12 (1970).

**But Not to Defective Statement of Good Claim.**—The motion to dismiss under section (b)(6) of this rule may not be successfully interposed to a complaint which was formerly labeled a "defective statement of a good cause of action." For such complaint, other provisions of this rule, the rules governing discovery, and the motion for summary judgment provide procedures adequate to supply information not furnished by the complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970); *Cassels v. Ford Motor Co.*, 10 N.C. App. 51, 178 S.E.2d 12 (1970).

**Complaint without Merit May Be Dismissed.**—A complaint may be dismissed on motion filed under section (b)(6) of this rule if it is clearly without merit; and this want of merit may consist in an absence of law to support a claim of the sort made, or absence of facts sufficient to make a good claim, or in the disclosure of some fact which will necessarily defeat the claim. *Hodges v. Wellons*, 9 N.C. App. 152, 175 S.E.2d 690 (1970).

**Plaintiff without Standing Fails to State a Claim.**—Since a wrongful death action

may be brought only "by the executor, administrator or collector of the decedent" under § 28-173, the plaintiff, who was the adopted daughter of the decedent, could not maintain the action in her own name, and therefore it was held that she failed to state a claim upon which relief could be granted, and the order dismissing her action under this rule was affirmed. *Young v. Marshburn*, 10 N.C. App. 729, 180 S.E.2d 43 (1971).

**For the purpose of the motion to dismiss, the well-pleaded material allegations of the complaint are taken as admitted;** but conclusions of law or unwarranted deductions of fact are not admitted. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

**Motions under sections (b)(6) and (c) of this rule can be treated as summary judgment motions,** the difference being that under sections (b)(6) and (c) the motion is decided on the pleadings alone, while under Rule 56 the court may receive and consider various kinds of evidence. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**Denial of Motion under Section (b)(6) Does Not Prevent Later Summary Judgment.**—The denial of a motion to dismiss for failure to state a claim upon which relief can be granted, which merely challenges the sufficiency of the complaint, does not prevent the court's allowing a subsequent motion for summary judgment based on affidavits outside the complaint. *Alltop v. J.C. Penny Co.*, 10 N.C. App. 692, 179 S.E.2d 885 (1971).

**Applied in** *Haddock v. Lassiter*, 8 N.C. App. 243, 174 S.E.2d 50 (1970); *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

**Cited in** *In re Estate of Davis*, 7 N.C. App. 697, 173 S.E.2d 620 (1970); *Davis v. Iredell County*, 9 N.C. App. 381, 176 S.E.2d 361 (1970); *Robbins v. Bowman*, 9 N.C. App. 416, 176 S.E.2d 346 (1970); *North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 180 S.E.2d 818 (1971); *Robinson v. McAdams*, 11 N.C. App. 105, 180 S.E.2d 399 (1971); *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

## Rule 13. Counterclaim and crossclaim.

**Editor's Note.**—

For note on relation back of barred counterclaims under Rule 13(f), see 49

N.C.L. Rev. 134 (1970).

**Cited in** *Ingram v. Nationwide Mut. Ins. Co.*, 5 N.C. App. 255, 168 S.E.2d 224 (1969).

## Rule 14. Third-party practice.

**Editor's Note.**—

For article on waiver of defense clauses

in consumer contracts, see 48 N.C.L. Rev. 545 (1970). For article on the legislative



changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

Cited in Ingram v. Nationwide Mut. Ins.

Co., 5 N.C. App. 255, 168 S.E.2d 224 (1969); Abdella v. Stringfellow, 8 N.C. App. 480, 174 S.E.2d 661 (1970).

## Rule 15. Amended and supplemental pleadings.

### Editor's Note.—

For note on specificity in pleading under North Carolina Rule 8(a)(1), see 48 N.C.L. Rev. 636 (1970). For note on relation back of barred counterclaims under Rule 13(f), see 49 N.C.L. Rev. 134 (1970).

### The judge, etc.—

The trial court has broad discretion in permitting or denying amendments. *Helson's Premiums & Gifts, Inc. v. Duncan*, 9 N.C. App. 653, 177 S.E.2d 428 (1970).

The distinction between supplemental pleadings and amendments is that supplemental pleadings relate to occurrences, transactions and events which may have happened since the date of the pleadings sought to be supplemented; whereas, amendments relate to occurrences, transactions and events that could have been, but for some reason were not, alleged in the pleadings sought to be amended. *Williams*

v. *Rutherford Freight Lines*, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

**Relation Back of Supplementary Pleadings.**—There can be no relation back of supplementary pleadings where at the time the suits were instituted no actionable damages existed, nor did the claims alleged become actionable within the time provided by statute for the instituting of suits in slander actions. *Williams v. Rutherford Freight Lines*, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

The case law is not clearly developed on the extent to which a supplemental complaint will be held to relate back for statute of limitations purposes. *Williams v. Rutherford Freight Lines*, 10 N.C. App. 384, 179 S.E.2d 319 (1971).

Cited in *Magnolia Apts., Inc. v. Hanes*, 8 N.C. App. 394, 174 S.E.2d 828 (1970).

## ARTICLE 4.

### Parties.

## Rule 17. Parties plaintiff and defendant; capacity.

(c) *Guardian ad litem for infants, insane or incompetent persons; appointment procedure.*—When a guardian ad litem is appointed to represent an infant or insane or incompetent person, he must be appointed as follows:

- (1) When an infant or insane or incompetent person is plaintiff, the appointment shall be made at any time prior to or at the time of the commencement of the action, upon the written application of any relative or friend of said infant or insane or incompetent person or by the court on its own motion.
- (2) When an infant is defendant and service under Rule 4(j)(1)a is made upon him the appointment may be made upon the written application of any relative or friend of said infant, or, if no such application is made within 10 days after service of summons, upon the written application of any other party to the action or, at any time by the court on its own motion.
- (3) When an infant or insane or incompetent person is defendant and service can be made upon him only by publication, the appointment may be made upon the written application of any relative or friend of said infant, or upon the written application of any other party to the action, or by the court on its own motion, before completion of publication, whereupon service of the summons with copy of the complaint shall be made forthwith upon said guardian so appointed requiring him to make defense at the same time that the defendant is required to make defense in the notice of publication.
- (4) When an insane or incompetent person is defendant and service by publication is not required, the appointment may be made upon the written application of any relative or friend of said defendant, or upon the



written application of any other party to the action, or by the court on its own motion, prior to or at the time of the commencement of the action, and service upon the insane or incompetent defendant may thereupon be dispensed with by order of the court making such appointment.

(1971, c. 1156, ss. 3, 4.)

**Editor's Note.—**

The 1971 amendment deleted "or Rule 4(j)(1)b" following "Rule 4(j)(1)a" in subsection (2) of section (c). The amendment also deleted "at any time after the filing of the affidavit required by Rule 4(j)(1)c and" following "on its own motion" in subsection (3) of section (c).

As the rest of this rule was not changed by the amendment, only section (c) is set out.

For note on requirement of notice for appointment of guardians ad litem and next friends, see 48 N.C.L. Rev. 92 (1969). For article on the legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

**Infants and persons non compos mentis are peculiarly entitled to the protection of the court.** Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**A principal means for extending this protection is by appointment of a guardian or, where appropriate, a guardian ad litem.** Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**It is ordinarily desirable that an incompetent's litigation be conducted by a general guardian, who, being in control of all his ward's affairs, can relate the effect of the litigation to the incompetent's entire estate.** Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

**This rule makes no reference to a "next friend," but provides for the appointment of a guardian or guardian ad litem for infants and incompetents who are parties, whether plaintiff or defendant, in any civil action.** Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**"Next Friend" and "Guardian ad Litem" Not Substantially Different.** — Although technically a next friend represents a plaintiff and a guardian ad litem represents a defendant, there is no substantial difference between the two. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

**Jurisdiction of Court to Appoint Guardian ad Litem for Adult Plaintiff.**—An adult plaintiff who is not an idiot or lunatic must be non compos mentis before the court has jurisdiction to appoint a guardian ad litem for him. Hagins v. Redevelopment Comm'n, 275 N.C. 90, 165 S.E.2d 490 (1969).

**Where a party in a civil action has been judicially determined or is conceded to be mentally incompetent, the law is clear; he must be represented by a guardian or guardian ad litem.** Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**If a defendant in a civil action is non compos mentis, he must defend by general or testamentary guardian if he has one within the State, otherwise by guardian ad litem to be appointed by the court.** Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**Either party, or the court upon its own motion, may initiate proceedings for the appointment of a guardian ad litem before any hearing on the merits.** Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**The court may not quash the service on an incompetent.** Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**But the court should see to it that an incompetent is properly represented before any action is taken which is detrimental to his interests.** Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**Judge Must Determine Question of Competency Before Proceeding with Trial.**—If in the course of the trial of a civil action or proceeding, circumstances are brought to the attention of the trial judge which raise a substantial question as to whether a party litigant, who is not already represented by a guardian, is non compos mentis, it is the duty of the trial judge to see that proper determination of this question is made before proceeding further with the trial in any way which might prejudice the rights of such party. Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**The trial court committed error in proceeding into a hearing on the merits, where the evidence bearing on the question of defendant's competency was at least sufficient to require the court to conduct a voir dire examination into the matter, preferably with the defendant present in person so that the court could observe him.** Rutledge v. Rutledge, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**Judge Determines Whether Circumstances Raise Substantial Question as to Competency.**—Whether the circumstances which are brought to the attention of the trial judge are sufficient to raise a sub-



stantial question as to the party's competency is a matter to be initially determined in the sound discretion of the trial judge. *Rutledge v. Rutledge*, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**In making this initial determination, normally a voir dire examination should be conducted.** *Rutledge v. Rutledge*, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**Where practicable, it is preferable that the party whose competency is questioned be present in person at the voir dire examination before the court.** *Rutledge v. Rutledge*, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**If the evidence at the voir dire examination is conflicting, the trial judge should make findings of facts as the basis for his determination as to whether any substantial question of competency is raised.** *Rutledge v. Rutledge*, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**Judge May Appoint Guardian ad Litem where Party Does Not Deny Incompetency.**—If, at the time appointed for the hearing, the party does not deny the allegation that he is incompetent, and the judge is satisfied that the application is made in good faith, and that the party is non compos mentis, the judge may proceed to appoint a guardian ad litem to act for him. *Rutledge v. Rutledge*, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**But Party Asserting Competency Is Entitled to Have Issue Determined as Provided in § 35-2.**—If, at the time appointed for the hearing, the party asserts his competency, he is entitled to have the issue determined as provided in § 35-2. *Rutledge v. Rutledge*, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**Such Party Is Entitled to Notice and Opportunity to Be Heard.**—When a party's lack of mental capacity is asserted and denied—and he has not previously been adjudicated incompetent to manage his affairs—he is entitled to notice and an opportunity to be heard before the judge can appoint a guardian ad litem for him. *Hagins v. Redevelopment Comm'n*, 275 N.C. 90, 165 S.E.2d 490 (1969).

Normally, a litigant has a fundamental right to select the attorney who will represent him in his lawsuit, to conduct his litigation according to his own judgment and inclination, and—if the case is to be compromised—to have it settled upon terms which are satisfactory to him. If this right is taken from him upon a factual finding which he disputes, fundamental fairness and the constitutional requirements of due process require that he be given an opportunity to defend and be heard. *Hagins*

*v. Redevelopment Comm'n*, 275 N.C. 90, 165 S.E.2d 490 (1969).

If the trial judge determines after voir dire examination that a substantial question as to the party's competency is raised, notice and opportunity to be heard must then be given the party for whom appointment of a guardian is proposed. *Rutledge v. Rutledge*, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

A person for whom a guardian ad litem is proposed is entitled to notice as in case of an inquisition of lunacy under § 35-2. *Rutledge v. Rutledge*, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

The trial court properly denied the motion for appointment of a guardian for the defendant, since no notice of such motion had been given to the defendant. *Rutledge v. Rutledge*, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**And Appointment Made without Notice and Opportunity to Be Heard Is Void.**—Where the plaintiff had neither notice that her competency to manage her affairs was challenged nor an opportunity to be heard on the issue, the order appointing a guardian ad litem was void and his settlements of her actions, notwithstanding they were approved by the court, were not binding upon her. *Hagins v. Redevelopment Comm'n*, 275 N.C. 90, 165 S.E.2d 490 (1969).

**Time for Notice.**—Section 35-2 does not specify the time for notice but, by analogy to Rule 6(d) of the Rules of Civil Procedure, five days' notice would be appropriate unless the court, for good cause, should prescribe a shorter period. *Rutledge v. Rutledge*, 10 N.C. App. 427, 179 S.E.2d 163 (1971).

**Test of Incompetency.**—While there are varying degrees of mental inadequacy, the law will not (and should not) deprive a person of the control of his lawsuit or his property unless he is "incompetent from want of understanding to manage his own affairs." This is the criterion fixed by § 35-2, and the word "affairs" encompasses a person's entire property and business—not just one transaction or one piece of property to which he may have a unique attachment. *Hagins v. Redevelopment Comm'n*, 275 N.C. 90, 165 S.E.2d 490 (1969).

There is no completely satisfactory definition of the phrase in § 35-2, "incompetent from want of understanding to manage his own affairs." *Hagins v. Redevelopment Comm'n*, 275 N.C. 90, 165 S.E.2d 490 (1969).

The facts in every case will be different and competency or incompetency will depend upon the individual's "general frame



and habit of mind." *Hagins v. Redevelopment Comm'n*, 275 N.C. 90, 165 S.E.2d 490 (1969).

Under § 35-2, if a person's mental condition is such that he is incapable of transacting the ordinary business involved in taking care of his property, if he is incapable of exercising rational judgment and weighing the consequences of his acts upon himself, his family, his property and estate, he is incompetent to manage his affairs. On the other hand, if he understands what is required for the management of his ordinary business affairs and is able to perform those acts with reasonable continuity, if he comprehends the effect of what he does, and can exercise his own will, he is not lacking in understanding within the meaning of the law, and he cannot be deprived of the control of his litigation or property. *Hagins v. Redevelopment Comm'n*, 275 N.C. 90, 165 S.E.2d 490 (1969).

Incompetency to administer one's property depends upon the general frame and habit of mind, and not upon specific actions, such as may be reflected by eccentricities, prejudices, or the holding of particular beliefs. *Hagins v. Redevelopment Comm'n*, 275 N.C. 90, 165 S.E.2d 490 (1969).

To authorize the appointment of a guardian

ad litem, it is not enough to show that another might manage a man's property more wisely or efficiently than he himself. *Hagins v. Redevelopment Comm'n*, 275 N.C. 90, 165 S.E.2d 490 (1969).

**Mere weakness of mind will not be sufficient** to put a person among those who are incompetent to manage their own affairs. *Hagins v. Redevelopment Comm'n*, 275 N.C. 90, 165 S.E.2d 490 (1969).

**The power, etc.—**

A guardian ad litem has no authority to receive money or administer the litigant's property. His powers are coterminous with the beginning and end of the litigation in which he is appointed. *Hagins v. Redevelopment Comm'n*, 275 N.C. 90, 165 S.E.2d 490 (1969).

**When Inquisition, etc.—**

An inquisition is not always a condition precedent for the appointment of a guardian ad litem. In an emergency, when it is necessary, pendente lite, to safeguard the property of a person non compos mentis whose incompetency has not been adjudicated, the protection of the court may be invoked in his behalf by one acting as guardian ad litem. *Hagins v. Redevelopment Comm'n*, 275 N.C. 90, 165 S.E.2d 490 (1969).

## Rule 18. Joinder of claims and remedies.

**Editor's Note.—**

For article on the legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

Applied in *Wickes Corp. v. Hodge*, 7 N.C. App. 529, 172 S.E.2d 890 (1970).

## Rule 19. Necessary joinder of parties.

Applied in *North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 180 S.E.2d 818 (1971).

## Rule 20. Permissive joinder of parties.

**Dismissal of Action as to One Defendant Held Error.**—Where questions of law and fact were raised by the complaint which were common to all of the named defendants, and a justiciable controversy was asserted between the parties, and the complaint alleged that one of the defendants

was a permissive and necessary party in the action, the trial judge committed error in allowing the motion of that defendant to dismiss the action as to her under Rule 41(b). *First-Citizens Bank & Trust Co. v. Carr*, 10 N.C. App. 610, 179 S.E.2d 838 (1971).

## Rule 23. Class actions.

Cited in *Stegall v. Housing Authority*, 278 N.C. 95, 178 S.E.2d 824 (1971).

## ARTICLE 5.

### *Depositions and Discovery.*

## Rule 26. Depositions in a pending action.

(b) *Scope of examination.*—Unless otherwise ordered by the judge as provided



by Rule 30(b) or (d), the deponent may be examined regarding any matter, not privileged, which is relevant to the subject matter in the pending action, whether it relates to the claim or defense of the examining party or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of relevant facts. It is not ground for objection that the testimony will be inadmissible at the trial if the testimony sought appears reasonably calculated to lead to the discovery of admissible evidence nor is it ground for objection that the examining party has knowledge of the matters as to which testimony is sought. But the deponent shall not be required to produce or submit for inspection any writing obtained or prepared by the adverse party, his attorney, surety, indemnitor, or agent in anticipation of litigation or in preparation for trial unless the judge otherwise orders on the ground that a denial of production or inspection will result in an injustice or undue hardship; but, in no event shall the deponent be required to produce or submit for inspection any part of a writing which reflects an attorney's mental impressions, conclusions, opinions or legal theories, or except as provided in Rule 35, the conclusions of an expert.

**Insurance agreements.**—A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement. (1971, c. 750.)

**Editor's Note.—**

The 1971 amendment added the second paragraph of section (b).

As the rest of this rule was not changed by the amendment, only section (b) is set out.

**Use of Depositions in Civil Cases Is Limited.**—Although the Rules of Civil Procedure provide extensive rights of discovery to any party, the use of a deposition in a civil case at the trial stage is sharply limited. *Maness v. Bullins*, 11 N.C. App. 567, 181 S.E.2d 750 (1971).

**Admissibility where Deponent Not a**

**Party.** — Where the record contained no indication by evidence or stipulation as to the whereabouts of a deponent who was not a party at the time the case came on for trial, and there was no finding or inquiry by the trial judge as to the existence of any of the conditions specified in section (d)(3) which would have made the interrogatories competent and admissible in evidence, their admission constituted prejudicial error. *Maness v. Bullins*, 11 N.C. App. 567, 181 S.E.2d 750 (1971).

**Applied in** *Continental Ins. Co. v. Foard*, 9 N.C. App. 630, 177 S.E.2d 431 (1970).

## Rule 27. Depositions before action or pending appeal.

**Section (b) replaces former statutes** providing the procedure for obtaining an order to take the deposition of an adverse party to obtain information to prepare a complaint or other pleading. In *re Lewis*, 11 N.C. App. 541, 181 S.E.2d 806 (1971).

**Contents of Petition under Section (b).**—Since section (b) provides that a petition may be filed before an action is commenced by the issuance and service of summons, it seems essential that the verified petition contain an unequivocal allegation that the petitioners expect to commence an action cognizable in the courts of this State, along with the names and addresses of the expected adverse parties, and that the party examined is an expected adverse party. In

*re Lewis*, 11 N.C. App. 541, 181 S.E.2d 806 (1971).

**Nature of Expected Action Must Be Described in Petition.**—It is essential under section (b) that the nature and purpose of any expected action be described in the petition in such detail as will enable the court to determine whether the information sought to be obtained from an expected adverse party is material and necessary to enable the petitioners to prepare their complaint. In *re Lewis*, 11 N.C. App. 541, 181 S.E.2d 806 (1971).

**A petition which shows on its face that the information sought is not necessary** to enable petitioner to prepare a complaint will not support an order for such examina-



tion. In re Lewis, 11 N.C. App. 541, 181 S.E.2d 806 (1971).

The court will not permit a party to spread a dragnet for an adversary to gain

facts upon which to sue him, or to harass him under the guise of a fair examination. In re Lewis, 11 N.C. App. 541, 181 S.E.2d 806 (1971).

### Rule 31. Depositions of witnesses upon written interrogatories.

**Use of Deposition in Civil Case Is Limited.**—Although the Rules of Civil Procedure provide extensive rights of discovery to any party, the use of a deposition in a civil case at the trial stage is sharply limited. *Maness v. Bullins*, 11 N.C. App. 567, 181 S.E.2d 150 (1971).

**Admissibility Where Deponent Not a Party.**—Where the record contained no indication by evidence or stipulation as to

the whereabouts of a deponent who was not a party at the time the case came on for trial, and there was no finding or inquiry by the trial judge as to the existence of any of the conditions specified in Rule 26(d)(3) which would have made the interrogatories competent and admissible in evidence, their admission constituted prejudicial error. *Maness v. Bullins*, 11 N.C. App. 567, 181 S.E.2d 750 (1971).

### Rule 33. Interrogatories to parties.

Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service is made by the plaintiff within 30 days after such commencement, leave of court granted with or without notice must first be obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them; and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 30 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown, enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined, but the making of objections to certain interrogatories shall not delay the answering of interrogatories to which objection is not made. If the objections are overruled, the court shall fix the time for answering the interrogatories.

Interrogatories may relate to any matters which can be inquired into under Rule 26(b), and the answers may be used to the same extent as provided in Rule 26(d) for the use of the deposition of a party. Interrogatories may be served after a deposition has been taken, and a deposition may be sought after interrogatories have been answered, but a judge of the court in which the action is pending, as defined by Rule 30(h), on motion of the deponent or the party interrogated, may make such protective order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30(b) are applicable for the protection of the party from whom answers to interrogatories are sought under this rule. (1967, c. 954, s. 1: 1971, c. 1156, s. 4.5.)

**Editor's Note.**—The 1971 amendment substituted "30" for "15" in the fourth sentence.

**Cited in** *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971); *King v. Lee*, 279 N.C. 100, 181 S.E.2d 400 (1971).

### Rule 34. Discovery and production of documents and things for inspection, copying or photographing.

**Editor's Note.**—For article on the legislative changes to

the new Rules of Civil Procedure, see 6 *Wake Forest Intra. L. Rev.* 267 (1970).



**Rule 36. Admission of facts and of genuineness of documents.**

Cited in *Kessing v. National Mtg. Corp.*,  
278 N.C. 523, 180 S.E.2d 823 (1971).

**ARTICLE 6.***Trials.***Rule 38. Jury trial of right.**

**Right to Demand Jury Trial.** — North Carolina Const., Art. I, § 25, guarantees to every person the "sacred and inviolable" right to demand a jury trial of issues of fact arising in all controversies at law respecting property. *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971).

**A party may waive his right to jury trial** by (1) failing to appear at the trial, (2) by written consent filed with the clerk, (3) by oral consent entered in the minutes of the court, (4) by failing to demand a jury trial pursuant to section (b). *Sykes v. Belk*, 278 N.C. 106, 179 S.E.2d 439 (1971).

**Issue of Fact Must Be Tried by Jury Unless Right Is Waived.**—The credibility of testimony is for the jury, not the court, and a genuine issue of fact must be tried by a jury unless this right is waived. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

**Rule 39. Trial by jury or by the court.**

Cited in *Wendell Tractor & Implement Co. v. Lee*, 9 N.C. App. 524, 176 S.E.2d 854 (1970).

**Rule 40. Assignment of cases for trial; continuances.****Editor's Note.**—

For article on the legislative changes to

the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

**Rule 41. Dismissal of actions.****Editor's Note.**—

For article on the legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

**Motion for Nonsuit Replaced by Motion for Dismissal.**—In nonjury trials the motion for nonsuit has been replaced by the motion for a dismissal. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

**Common-Law Rule Changed.** — This State has continued up until the present time to follow the common-law rule which permitted the plaintiff to take a nonsuit at any time before the verdict. But this rule of practice has been changed by the adoption of this rule, which provides that an action or any claim therein may be dismissed by the plaintiff without an order of court "by filing a notice of dismissal at any time before the plaintiff rests his case." *Clemmons v. Life Ins. Co.*, 6 N.C. App. 708, 171 S.E.2d 87 (1969).

Under the new Rules of Civil Procedure

**Transfer of Action without Notice Denied Defendant's Right to Jury Trial.**—Defendant was denied its constitutional right to a jury trial where the action was transferred from the superior court division to the district court division without notice to defendant, so that defendant made no demand for jury trial in the district court within the 10-day time period formerly allowed by § 7A-196 (this section now applies and contains similar requirements), and the district court subsequently denied defendant's demand for a jury trial. *Thermo-Industries v. Talton Constr. Co.*, 9 N.C. App. 55, 175 S.E.2d 370 (1970).

**Applied in** *Wendell Tractor & Implement Co. v. Lee*, 9 N.C. App. 524, 176 S.E.2d 854 (1970).

a plaintiff can no longer take a voluntary nonsuit as a matter of right or secure a voluntary dismissal without prejudice after he has rested his case. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

**This rule permits one voluntary dismissal**, but the right must be exercised before a plaintiff rests his case. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

**The purpose of section (a)(2)** is to permit a superior court judge in the exercise of his discretion to dismiss an action without prejudice if in his opinion an adverse judgment with prejudice would defeat justice. *King v. Lee*, 279 N.C. 100, 181 S.E.2d 400 (1971).

**Dismissal under Section (a)(2).** — Under section (a)(2), at the instance of the plaintiff, the court may permit a voluntary dismissal upon such terms and conditions as justice requires. *King v. Lee*, 279 N.C. 100, 181 S.E.2d 400 (1971).

The court may, at the instance of the



petitioners, order a voluntary dismissal without prejudice upon such terms and conditions as justice requires. *King v. Lee*, 279 N.C. 100, 181 S.E.2d 400 (1971).

A dismissal without prejudice is permissible under section (a)(2) only when so ordered by the court, in the exercise of its judicial discretion, upon finding that justice so requires. *King v. Lee*, 279 N.C. 100, 181 S.E.2d 400 (1971).

**Plaintiff May Move for Voluntary Dismissal after Defendant Moves for Directed Verdict.**—Prior to granting the motion of the answering defendants for a directed verdict against plaintiffs and the entry of a judgment adverse to plaintiffs, plaintiffs are entitled to move, if so advised, that an order be entered providing for a voluntary dismissal upon such terms and conditions as justice requires. Whether such order should be entered will be addressed to the discretion of the superior court judge. *King v. Lee*, 279 N.C. 100, 181 S.E.2d 400 (1971).

When a motion for a directed verdict under Rule 50(a) is granted, the defendant is entitled to a judgment on the merits unless the court permits a voluntary dismissal of the action under section (a)(2). The court may permit a voluntary dismissal upon such terms and conditions as justice requires. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

When a defendant's motion for a directed verdict under Rule 50(a) is granted, the defendant is entitled to judgment unless the court permits a voluntary dismissal of the action under section (a)(2) of this rule. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971).

**Section (b) is applicable only in a trial by the court without a jury.** *Pergerson v. Williams*, 9 N.C. App. 512, 176 S.E.2d 885 (1970).

Section (b) has no application when considering a motion for a directed verdict in a jury trial. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971).

Section (b) applies only "in an action tried by the court without a jury." *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971).

A motion for a directed verdict under Rule 50(a) is proper when a trial is being held before a jury. Where a case is tried by the judge without a jury, the appropriate motion in such case is for involuntary dismissal under section (b) of this rule. *Bryant v. Kelly*, 10 N.C. App. 208, 178 S.E.2d 113 (1970).

**Thus, Involuntary Dismissal in Trial before Jury Treated as Directed Verdict.** —

Where judgment of involuntary dismissal in a trial before a jury was improperly entered under section (b), which is applicable only in a trial by the court without a jury, it may properly be treated as a motion for a directed verdict under Rule 50(a). *Pergerson v. Williams*, 9 N.C. App. 512, 176 S.E.2d 885 (1970).

**Defendant's Motion to Dismiss at Close of Plaintiff's Evidence.** — If a trial judge allows the defendant's motion to dismiss made at the close of plaintiff's evidence on the grounds that upon the facts and the law the plaintiff has shown no right to relief, the court, as the trier of the facts, should determine the facts and render judgment against the plaintiff. *Wells v. Sturdivant Life Ins. Co.*, 10 N.C. App. 584, 179 S.E.2d 806 (1971).

**Defendant's Motion Challenges Sufficiency of Plaintiff's Evidence.**—Defendant's motion for an involuntary dismissal in an action tried by the court without a jury challenges the sufficiency of the plaintiff's evidence to establish his right to relief. *Wells v. Sturdivant Life Ins. Co.*, 10 N.C. App. 584, 179 S.E.2d 806 (1971).

**Function of Judge on Motion under Section (b).** — In a nonjury case, in which all issues of fact are in any event to be determined by the judge, the function of the judge on a motion to dismiss under section (b) of this rule is to evaluate the evidence without any limitations as to the inferences which the court must indulge in favor of the plaintiff's evidence on a similar motion for a directed verdict in a jury case. *Bryant v. Kelly*, 10 N.C. App. 208, 178 S.E.2d 113 (1970).

In ruling on a motion to dismiss under section (b) of this rule, the court must pass upon whether the evidence is sufficient as a matter of law to permit a recovery; and, if so, must pass upon the weight and credibility of the evidence upon which the plaintiff must rely in order to recover. *Airport Knitting, Inc. v. King Kotton Yarn Co.*, 11 N.C. App. 162, 180 S.E.2d 611 (1971).

**Facts Found by Judge on Motion to Dismiss Are Conclusive on Appeal.** — Where, on a motion to dismiss, the trial court as the trier of the facts has found the facts specially, such findings are conclusive upon appeal if supported by competent evidence, even though there may be evidence which might sustain findings to the contrary. In such case the trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him. He passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom. If dif-



ferent inferences may be drawn from the evidence, he determines which inferences shall be drawn and which shall be rejected. *Bryant v. Kelly*, 10 N.C. App. 208, 178 S.E.2d 113 (1970).

**Dismissal as to One of Several Defendants.** — Where questions of law and fact were raised by the complaint which were common to all of the named defendants, and a justiciable controversy was asserted between the parties, and the complaint alleged that one of the defendants was a permissive and necessary party in the action, the trial judge committed error in allowing the motion of that defendant to dismiss the

#### Rule 42. Consolidation; separate trials.

**Decision as to Consolidation Is within Discretion of Trial Judge.**—Both cases being properly before the district court, it was within the discretion of the trial judge as to whether consolidation should be allowed. *In re Moore*, 11 N.C. App. 320, 181 S.E.2d 118 (1971).

**And Will Not Be Disturbed without Showing of Injury and Clear Abuse of Dis-**

#### Rule 43. Evidence.

**Use of Deposition at Trial Is Limited.**—Although the Rules of Civil Procedure provide extensive rights of discovery to any party, the use of a deposition in a civil case at the trial stage is sharply limited. *Maness v. Bullins*, 11 N.C. App. 567, 181 S.E.2d 750 (1971).

**Admissibility of Deposition where Deponent Not a Party.** — Where the record contained no indication by evidence or stipulation as to the whereabouts of a deponent who was not a party at the time

#### Rule 44. Proof of official record.

*Cited in Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

#### Rule 45. Subpoena.

(a) *For attendance of witnesses; issuances; form.*—A subpoena for the purpose of obtaining the testimony of a witness in a pending cause shall, except as hereinafter provided, be issued at the request of any party by the clerk of superior court for the county in which the hearing or trial is to be held. A subpoena shall be directed to the witness, shall state the name of the court and the title of the action, the name of the party at whose instance the witness is summoned, and shall command the person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence, signed but otherwise in blank, to a party requesting it, who shall fill it in before service. A subpoena for a witness or witnesses need not be signed by the clerk, and is sufficient if signed by the party or his attorney.

(1971, c. 159.)

**Editor's Note.**—

The 1971 amendment added the last sentence in section (a).

action as to her under section (b) of this rule. *First-Citizens Bank & Trust Co. v. Carr*, 10 N.C. App. 610, 179 S.E.2d 838 (1971).

*Applied in Perry v. Suggs*, 9 N.C. App. 128, 175 S.E.2d 696 (1970); *First Nat'l Bank v. Black*, 10 N.C. App. 270, 178 S.E.2d 108 (1970).

*Cited in Musgrave v. Mutual Sav. & Loan Ass'n*, 8 N.C. App. 385, 174 S.E.2d 820 (1970); *Blackwell v. Butts*, 278 N.C. 615, 180 S.E.2d 835 (1971); *Sheppard v. Barrus Constr. Co.*, 11 N.C. App. 358, 181 S.E.2d 130 (1971).

**cretion.**—An action of the trial judge as to a matter within his judicial discretion will not be disturbed unless a clear abuse of discretion is shown. Moreover, when the consolidation of actions for the purpose of trial is assigned as error, the appellant must show injury or prejudice arising therefrom. *In re Moore*, 11 N.C. App. 320, 181 S.E.2d 118 (1971).

the case came on for trial, and there was no finding or inquiry by the trial judge as to the existence of any of the conditions specified in Rule 26(d)(3) which would have made the interrogatories competent and admissible in evidence, their admission constituted prejudicial error. *Maness v. Bullins*, 11 N.C. App. 567, 181 S.E.2d 750 (1971).

*Stated in Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

As the rest of the rule was not changed by the amendment, only section (a) is set out.



### Rule 49. Verdicts.

#### The judge is required, etc.—

It is the duty of the trial judge to submit to the jury such issues as are necessary to settle the material controversies raised in the pleadings. *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971).

#### Ordinarily, the form, etc.—

The form and number of issues to be submitted is a matter which rests in the sound discretion of the trial judge, assuming that the issue is raised by the pleadings, liberally construed. *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971).

**Separate Submission of Related Issues Not Error.**—Where the allegations of the complaint were sufficient to justify submission to the jury of the questions of fraud,

duress and undue influence, which are not synonymous, although they overlap to some degree, submission of these several possibilities in a single issue would have been confusing and would have necessitated an exceedingly complicated charge; and there was no abuse of the trial court's discretion in their submission as three separate issues. *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971).

#### An issue of fact, etc.—

Issues in a case arise only upon the controverted material facts raised by the pleadings and supported by the evidence. *Crowder v. Jenkins*, 11 N.C. 57, 180 S.E.2d 482 (1971).

### Rule 50. Motion for a directed verdict and for judgment notwithstanding the verdict.

**Comment—1969 Amendment.** — Rule 50, both in its old version and in the new, contemplates that when a party moves for a directed verdict and his motion is denied or for any reason is not granted, that party may, after an adverse verdict or the failure of the jury to return a verdict, move for judgment notwithstanding the verdict. When the movant for a directed verdict who is not immediately successful later moves for a judgment notwithstanding the verdict and his motion is granted or denied, and there is an appeal, the powers of the appellate court are reasonably clear, as outlined in section 50(c) and (d). But when the movant for a directed verdict later fails to move for a judgment notwithstanding the verdict, there has been in the federal courts uncertainty about the powers of an appellate court. See 5 Moore's Federal Practice, §§ 2365-2374. The uncertainty revolves around the question of whether an appellate court can direct entry of judgment for a party who was erroneously denied a directed verdict but who later failed to move, as the rule contemplates, for a motion for judgment notwithstanding the verdict. The Supreme Court ruled in *Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 67 S. Ct. 752, 91 L. Ed. 849 (1947), that in the circumstances outlined the appellate court was limited to directing a new trial.

It might be said that the rationale of the court's ruling in the *Cone* case rests on a desire that no final conclusive judgment be rendered against a party unless the trial judge has had an opportunity to consider whether the loser should be given another chance. The trial judge would

not have this opportunity in the absence of some such rule as that enunciated in *Cone*.

The Commission has from the first embraced the *Cone* result. The Commission has gone further and attempted to meet some of the problems spawned by the *Cone* decision.

Its first effort was the rather clumsy one comprised in the last two sentences of Rule 50(b) as it was originally enacted. These two sentences have now been deleted and they should be forgotten.

In their stead, the General Assembly has added a new final sentence to what is now section 50(b)(1) and a new section 50(b)(2). These additions make clear the power of a trial judge, once there has been a motion for a directed verdict, to consider on his own motion, after entry of judgment (see Rule 58 as to when judgment is deemed to be entered), entry of judgment in accordance with the directed verdict motion. The additions also make clear that without some post-verdict consideration of a motion for judgment or the reserved motion for a directed verdict, the appellate court cannot, if it should find erroneous the failure to grant the motion for directed verdict, direct entry of judgment for the appellant but can only order a new trial.

#### Editor's Note.—

For article on the legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

**Difference between Directed Verdicts in Criminal and Civil Cases.**—For a discussion of the difference between directed verdicts in criminal and civil cases, see *State v. Riley*, 113 N.C. 648, 18 S.E. 168 (1893);

Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

**Right to Jury Trial Guaranteed.**—North Carolina Const., Art. I, § 25, has been construed to guarantee trial by jury in all civil actions where the parties have not waived the right. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

**Jury Determines Issue Where More than One Conclusion Can Be Drawn.** — Where more than one conclusion can reasonably be drawn, determination of the issue is properly for the jury. Maness v. Fowler-Jones Constr. Co., 10 N.C. App. 592, 179 S.E.2d 816 (1971).

**Discrepancies and contradictions in the evidence are to be resolved by the jury** and not by the court. Naylor v. Naylor, 11 N.C. App. 384, 181 S.E.2d 222 (1971).

**Directed verdicts are appropriate only in jury cases.** Bryant v. Kelly, 279 N.C. 123, 181 S.E.2d 438 (1971).

When plaintiff filed its motion asking the trial court to approve and adopt the referee's report, it inappropriately made a directed verdict. A motion for directed verdict and a directed verdict are not proper where the trial is before the judge sitting without a jury. Porter Bros. v. Jones, 11 N.C. App. 215, 181 S.E.2d 177 (1971).

A motion for a directed verdict under section (a) of this rule is proper when a trial is being held before a jury. Where a case is tried by the judge without a jury, the appropriate motion in such case is for involuntary dismissal under Rule 41(b). Bryant v. Kelly, 10 N.C. App. 208, 178 S.E.2d 113 (1970).

**Motion for Directed Verdict and Motion for Nonsuit Compared.** — A motion for directed verdict under the new rules produces virtually the same effect and ordinarily will be treated the same as a motion for nonsuit under the old rules in determining whether the evidence should be submitted to the jury. Aetna Cas. & Sur. Co. v. Lumbermen's Mut. Cas. Co., 11 N.C. App. 490, 181 S.E.2d 727 (1971).

**Classes of Cases Not Ordinarily Subject to Directed Verdict.**—Those classes of cases not subject to nonsuit under the old rules would not be ordinarily subject to directed verdict under the new rules. Aetna Cas. & Sur. Co. v. Lumbermen's Mut. Cas. Co., 11 N.C. App. 490, 181 S.E.2d 727 (1971).

A nonsuit was prohibited in caveat proceedings. Aetna Cas. & Sur. Co. v. Lumbermen's Mut. Cas. Co., 11 N.C. App. 490, 181 S.E.2d 727 (1971).

A judgment of nonsuit could not be entered in a declaratory judgment action. Aetna Cas. & Sur. Co. v. Lumbermen's

Mut. Cas. Co., 11 N.C. App. 490, 181 S.E.2d 727 (1971).

Since the nonsuit and directed verdict are so analogous, directed verdict in a declaratory judgment action was not appropriate, but upon the evidence, a peremptory instruction would have been appropriate. Aetna Cas. & Sur. Co. v. Lumbermen's Mut. Cas. Co., 11 N.C. App. 490, 181 S.E.2d 727 (1971).

**In a jury trial, the motion for a directed verdict** is the only device by which the adverse party can challenge the sufficiency of the evidence to go to the jury. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

In a case tried to a jury, after a plaintiff has put on evidence and rested, a defendant who asserts that the evidence of the plaintiff is insufficient to permit a recovery is restricted to making a motion for a directed verdict under section (a) of this rule. Creasman v. First Fed. Sav. & Loan Ass'n, 10 N.C. App. 182, 177 S.E.2d 770 (1970).

**Involuntary Dismissal in Jury Trial Treated as Directed Verdict.**—Where judgment of involuntary dismissal in a trial before a jury was improperly entered under Rule 41(b), which is applicable only in a trial by the court without a jury, it may properly be treated as a motion for a directed verdict under this rule. Pergerson v. Williams, 9 N.C. App. 512, 176 S.E.2d 885 (1970).

Defendants' motion for "dismissal" on grounds of insufficient evidence to go to the jury, rather than for a "directed verdict," is not fatal where the defendants stated grounds entitling them to a directed verdict. Creasman v. First Fed. Sav. & Loan Ass'n, 10 N.C. App. 182, 177 S.E.2d 770 (1970).

**Motion for "Judgment of Nonsuit" Treated as Motion for Directed Verdict.**—Defendant's motion for "judgment of nonsuit" made at the close of plaintiff's evidence, and again at the close of all the evidence was treated as a motion for a directed verdict under this rule. The new rules contemplate that the name of the motion is not as important as the substance. Wheeler v. Denton, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

**Common-Law Directed Verdict Was Judgment on Merits.**—When granted, the common-law motion for a directed verdict resulted in a judgment on the merits in either a criminal or a civil case. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

**Defendant Is Entitled to Judgment on Merits when Motion for Directed Verdict Granted.** — When a motion for a directed verdict under this rule is granted, the defendant is entitled to a judgment on the merits.



Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

When a defendant's motion for a directed verdict under this rule is granted, the defendant is entitled to judgment. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

**Unless Court Permits Voluntary Dismissal under Rule 41(a)(2).**—When a motion for a directed verdict under this rule is granted, the defendant is entitled to a judgment on the merits unless the court permits a voluntary dismissal of the action under Rule 41(a)(2). The court may permit a voluntary dismissal upon such terms and conditions as justice requires. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

When a defendant's motion for a directed verdict under this rule is granted, the defendant is entitled to judgment unless the court permits a voluntary dismissal of the action under Rule 41(a)(2). Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

At the instance of the plaintiff, the court may permit a voluntary dismissal upon such terms and conditions as justice requires. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

**Rule 41(b) has no application when considering a motion for a directed verdict in a jury trial.** Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

**Question Presented by Motion for Directed Verdict.**—The question presented by the defendant's motion for a directed verdict is whether the evidence, when considered in the light most favorable to plaintiff, is sufficient for submission to the jury. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

The motion for a directed verdict in a jury trial presents the question whether the evidence, when considered in the light most favorable to the party against whom the motion is made, is sufficient for submission to the jury. Sink v. Sink, 11 N.C. App. 549, 181 S.E.2d 721 (1971).

A defendant's motion for a directed verdict in a jury trial made under this rule presents the question whether the evidence is sufficient to entitle the plaintiff to have the jury pass on it. Maness v. Fowler-Jones Constr. Co., 10 N.C. App. 592, 179 S.E.2d 816 (1971).

The defendant's motion for a directed verdict under this rule presents a question of law for decision by the court, namely, whether the evidence is sufficient to entitle the plaintiff to have the jury pass on it. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

The defendant's motion for a directed verdict presents substantially the same question formerly presented by the motion for nonsuit, that is, whether the evidence considered in the light most favorable to the claimant will justify a verdict in his favor. Cutts v. Casey, 278 N.C. 390, 180 S.E.2d 297 (1971).

**Trial Court Should Not Make Findings of Fact or State Conclusions of Law.**—In resolving the question presented by a motion for directed verdict, it is not required or appropriate that the trial court make "findings of fact" and state "conclusions of law." Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971); Sink v. Sink, 11 N.C. App. 549, 181 S.E.2d 721 (1971).

**Trial Judge Must Consider Evidence in Light Most Favorable to Plaintiff on Defendant's Motion for Directed Verdict.**—When a motion for directed verdict is made under this rule at the conclusion of the plaintiff's evidence, the trial judge must determine whether the evidence, taken in the light most favorable to the plaintiff and giving to it the benefit of every reasonable inference which can be drawn therefrom was sufficient to withstand defendant's motion for a directed verdict. Sawyer v. Shackleford, 8 N.C. App. 631, 174 S.E.2d 305 (1970).

In considering a motion for a directed verdict in favor of defendant, the evidence must be viewed in the light most favorable to plaintiff. Naylor v. Naylor, 11 N.C. App. 384, 181 S.E.2d 222 (1971).

On a motion by a defendant for a directed verdict in a jury case, the court must consider all the evidence in the light most favorable to the plaintiff and may grant the motion only if, as a matter of law, the evidence is insufficient to justify a verdict for the plaintiff. Kelly v. International Harvester Co., 278 N.C. 153, 179 S.E.2d 396 (1971).

Upon a defendant's motion for a directed verdict, all evidence which supports plaintiff's claim must be taken as true and viewed in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in his favor. Maness v. Fowler-Jones Constr. Co., 10 N.C. App. 592, 179 S.E.2d 816 (1971).

Upon a motion for a directed verdict made by a defendant under the provisions of this rule, all evidence which supports the plaintiff's claim must be taken as true and considered in the light most favorable to the plaintiff, giving him the benefit of



every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in the plaintiff's favor. *Ingold v. Carolina Power & Light Co.*, 11 N.C. App. 253, 181 S.E.2d 173 (1971).

Under this section all evidence which supports a plaintiff's claim must be taken as true and considered in the light most favorable to plaintiff, giving to plaintiff the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in plaintiff's favor. *Pergerson v. Williams*, 9 N.C. App. 512, 176 S.E.2d 885 (1970).

**Conflicts Resolved in Defendant's Favor in Passing on Plaintiff's Motion.**—Insofar as the defendant's testimony creates a conflict in his testimony, it must be resolved in his favor in passing on the plaintiff's motion for a directed verdict. *Coppley v. Carter*, 10 N.C. App. 512, 179 S.E.2d 118 (1971).

**Principles Guiding Determination of Sufficiency of Plaintiff's Evidence.**—In determining the sufficiency of a plaintiff's evidence to withstand a defendant's motion for a directed verdict in a jury case, the trial court and the Court of Appeals are guided by the same principles that prevailed under the former procedure with respect to the sufficiency of evidence to withstand a motion for nonsuit under former § 1-183. *Pergerson v. Williams*, 9 N.C. App. 512, 176 S.E.2d 885 (1970).

Determination of the sufficiency of the evidence to withstand a motion for a directed verdict made by a defendant under the provisions of this rule is guided by the same principles that prevailed under the former procedure with respect to motion for nonsuit. *Ingold v. Carolina Power & Light Co.*, 11 N.C. App. 253, 181 S.E.2d 173 (1971).

**Verdict Directed for Defendant Where Plaintiff Shows No Right to Relief.**—When it is clear that the plaintiff has shown no right to relief, the judge will direct a verdict for the defendant at the close of plaintiff's evidence just as he could formerly grant a motion for compulsory nonsuit. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

**Evidence Raising Only Conjecture Is Not Sufficient to Withstand Motion.**—Evidence which does no more than raise a possibility or conjecture of a fact is not sufficient to withstand a motion by defendant for a directed verdict. *Ingold v. Carolina Power & Light Co.*, 11 N.C. App. 253, 181 S.E.2d 173 (1971).

**The judge may direct a verdict only when the issue submitted presents a question of law based on admitted facts.** *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

North Carolina allows directed verdicts only when the evidence presents a question of law based on admitted facts. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

**The court can always direct a verdict against the party with the burden of proof, if there is no evidence in his favor.** *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

**But a verdict may never be directed when the facts are in dispute.** *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

**Thus, the judge cannot direct a verdict upon any controverted issue in favor of the party having the burden of proof even though the evidence is uncontradicted.** *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

Under this rule, the trial judge cannot direct a verdict in favor of the party having the burden of proof when his right to recover depends upon the credibility of his witnesses. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

Ordinarily, it is not permissible to direct a verdict in favor of a litigant on whom rests the burden of proof. *Smith v. Burleson*, 9 N.C. App. 611, 177 S.E.2d 451 (1970).

This rule, which deals only with jury trials, does not purport to confer upon the judge the power to pass upon the credibility of the evidence and to direct a verdict in favor of the party having the burden of proof. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

**Since defendant's denial of an alleged fact raises an issue as to its existence even though he offers no evidence tending to contradict that offered by plaintiff.** *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

**And the credibility of testimony is for the jury, not the court, and a genuine issue of fact must be tried by a jury unless this right is waived.** *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

**But Court May Give Peremptory Instruction in Favor of Party with Burden of Proof.**—When there is no conflict in the evidence and but one inference is permissible from it, the court may give a peremptory instruction in favor of the party having the burden of proof. Such an instruction directs the jury to answer the issue in favor of the plaintiff if it finds the facts to be as all the evidence tends to show; otherwise not. To so instruct is not to direct a verdict. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

When all the evidence offered suffices, if



true, to establish the controverted fact, the court may give a peremptory instruction—that is, if the jury find the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

**A peremptory instruction does not deprive the jury of its right to reject the evidence** because of lack of faith in its credibility. Such an instruction differs from a directed verdict. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

**When Directed Verdict in Favor of Party with Burden of Proof Is Permissible.** — When facts are judicially admitted and are no longer a subject of inquiry, then directing a verdict in favor of a litigant on whom rests the burden of proof is not only permissible, but it is the duty of the judge to answer the issue. *Smith v. Burleson*, 9 N.C. App. 611, 177 S.E.2d 451 (1970).

After looking at all of the evidence, if no other reasonable conclusion is possible then a directed verdict would be proper even though such directed verdict is in favor of the litigant upon whom rests the burden of proof. *Smith v. Burleson*, 9 N.C. App. 611, 177 S.E.2d 451 (1970).

When all of the evidence has been introduced, the facts established and a defendant has proved himself negligent, there is no factual issue of negligence remaining as a subject of inquiry, and on this issue there is no duty resting upon the jury. In a situation of this kind, it is no longer necessary for the jury to intervene, and the trial judge should enter a directed verdict. *Smith v. Burleson*, 9 N.C. App. 611, 177 S.E.2d 451 (1970).

The Court of Appeals has customarily adopted a rule of entering a judgment of nonsuit against a plaintiff when the plaintiff's own evidence establishes contributory negligence. This is tantamount to directing a verdict in favor of the party with the burden of proof. *Smith v. Burleson*, 9 N.C. App. 611, 177 S.E.2d 451 (1970).

A directed verdict against the plaintiff is proper in a negligence case only when contributory negligence is so clearly established that no other conclusion can reasonably be reached. *Naylor v. Naylor*, 11 N.C. App. 384, 181 S.E.2d 222 (1971).

The words, "without any assent of the jury," are used to dispel any apprehension that the jury is required to perform a perfunctory act in connection with the verdict in a case which is not submitted to it for determination. *Kelly v. International Harvester Co.*, 278 N.C. 153, 179 S.E.2d 396 (1971).

**Specific Grounds Must Be Stated in Motion for Directed Verdict.**—The provision of this rule which requires that "specific grounds" shall be stated in a motion for a directed verdict is mandatory. *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

A motion for a directed verdict shall state the specific grounds therefor; this rule is mandatory. *Turner v. Turner*, 9 N.C. App. 336, 176 S.E.2d 24 (1970).

Since the statute expressly requires that "specific grounds" shall be stated in a motion for a directed verdict, this provision of the rule is mandatory. *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

**Failure to State Grounds Is Sufficient Basis for Overruling Motion.** — A defendant's failure to state the grounds for his motions for a directed verdict is sufficient basis for the court's overruling them. *Dixon v. Shelton*, 9 N.C. App. 392, 176 S.E.2d 390 (1970).

**No Appeal from Denial of Motion Which Fails to State Grounds.**—If the court denies a motion for a directed verdict which fails to state the specific grounds for the motion, the moving party may not complain of the denial on appeal. *Pergerson v. Williams*, 9 N.C. 512, 176 S.E.2d 885 (1970).

An appellant, who fails to state "specific grounds," is not entitled upon appeal to question the insufficiency of the evidence to support the verdict. *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

An appellant who fails to state specific grounds for his motion for a directed verdict is not entitled, on appeal from the court's refusal to allow the motion, to question the insufficiency of the evidence to support the verdict. *Builders Supplies Co. v. Gainey*, 10 N.C. App. 364, 178 S.E.2d 794 (1971).

The defendant, having failed to state "specific grounds," is not entitled upon appeal to question the insufficiency of the evidence to support the verdict. *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

**Nor from Granting of Motion where Such Failure Not Objected to.** — If the court grants a motion for a directed verdict which fails to state the specific grounds for the motion, the adverse party who did not object to failure of the motion to state specific grounds therefor cannot raise such objection in the appellate court. *Pergerson v. Williams*, 9 N.C. 512, 176 S.E.2d 885 (1970).

If a motion for a directed verdict is granted, the adverse party who did not object at trial to the failure of the motion to state specific grounds therefor cannot



raise the objection on appeal. *Builders Supplies Co. v. Gainey*, 10 N.C. App. 364, 178 S.E.2d 794 (1971).

**Method of Complying with Requirement to State Grounds.**—A motion for a directed verdict, “citing the case of *Blake v. Mallard*, decided by Justice Sharp in 1964,” is certainly not an approved method of complying with the requirement that “a motion for a directed verdict shall state the specific grounds therefor.” *Grant v. Greene*, 11 N.C. App. 537, 181 S.E.2d 770 (1971).

**Grounds Should Be Included in Record on Appeal.** — Litigants would be well advised to include in the record the specific grounds stated in the motion for a directed verdict. A failure to do so could result in a dismissal of the appeal. *Davis v. Peacock*, 10 N.C. App. 256, 178 S.E.2d 133 (1970).

**Failure to Renew Motion Following Opponent's Additional Evidence.** — Where a defendant failed to renew a motion for a directed verdict following a plaintiff's additional evidence, the Court of Appeals will not pass upon the sufficiency of the evidence to survive a motion for a directed verdict. *Gragg v. Burns*, 9 N.C. App. 240, 175 S.E.2d 774 (1970).

**Appellate Court's Determination of Sufficiency of Evidence to Withstand Motion.**—On appeal from the granting of a defendant's motion for directed verdict under this rule, the court must determine the sufficiency of plaintiff's evidence guided by the same principles applicable in determining the sufficiency of evidence to withstand the motion for nonsuit under former § 1-183. *Naylor v. Naylor*, 11 N.C. App. 384, 181 S.E.2d 222 (1971).

On appeal from the granting of a motion for directed verdict against the plaintiff, all the evidence tending to support plaintiff's claim must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which legitimately may be drawn therefrom, with contradictions, conflicts and inconsistencies therein being resolved in plaintiff's favor. *Adler v. Lumber Mut. Fire Ins. Co.*, 10 N.C. App. 720, 179 S.E.2d 786 (1971).

In determining the sufficiency of the evidence the Court of Appeals is guided by the same principles that prevailed under the former procedure with respect to the sufficiency of evidence to withstand a motion for nonsuit under former § 1-183. All evidence which supports plaintiffs' claim must be taken as true and considered in the light most favorable to plaintiffs, giving them the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts

and inconsistencies being resolved in plaintiffs' favor. *Musgrave v. Mutual Sav. & Loan Ass'n*, 8 N.C. App. 385, 174 S.E.2d 820 (1970).

**Appellate Court Must Look to Evidence.**—

To pass upon the single question of law presented, namely, the sufficiency of plaintiff's evidence to withstand defendant's motion for a directed verdict, the appellate court must look to the evidence and base decision thereon without regard to the trial court's “findings of fact” and “conclusions of law.” *Sink v. Sink*, 11 N.C. App. 549, 181 S.E.2d 721 (1971).

**Upon deciding that the trial court should have granted appellant's motion for a directed verdict made at the close of all the evidence, the Court of Appeals may appropriately direct entry of judgment in accordance with the appellant's motion, but only when the appellant also in apt time moved for judgment notwithstanding the verdict.** *Nichols v. C.J. Moss Real Estate, Inc.*, 10 N.C. App. 66, 177 S.E.2d 750 (1970).

**The availability of a motion for a judgment notwithstanding the verdict constitutes an innovation in the civil procedure of this State.** Formerly, a motion for nonsuit made under the provisions of former § 1-183 could not be allowed after verdict for insufficiency of the evidence. *Musgrave v. Mutual Sav. & Loan Ass'n*, 8 N.C. App. 385, 174 S.E.2d 820 (1970).

**Appropriate Motion for Directed Verdict Is Prerequisite to Motion for Judgment Notwithstanding Verdict.**—The language of this rule is almost identical to the language of Rule 50, Federal Rules of Civil Procedure. The well-recognized interpretation of this rule is that the making of an appropriate motion for a directed verdict is an absolute prerequisite for the motion for judgment notwithstanding the verdict. *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

**And Motion for Directed Verdict after Jury Has Returned Verdict Is Too Late.**—A litigant's motion for directed verdict nunc pro tunc, which is made after the jury has returned its verdict in a case, comes too late to preserve its right to move for judgment notwithstanding the verdict; therefore, a litigant's purported motion for judgment n.o.v. is then properly denied. *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

This rule provides for a motion for a directed verdict at the close of plaintiff's evidence or at the close of all the evidence. It does not give a litigant the option of waiting until after the verdict is in to make



the motion for a directed verdict to attempt to preserve his right to move for judgment notwithstanding the verdict. *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

**Sufficiency of Evidence Is Questioned upon Motion for Judgment Non Obstante Veredicto.**—Upon a motion for judgment non obstante veredicto, the sufficiency of the evidence upon which the jury based its verdict is drawn into question. *Horton v. Iowa Mut. Ins. Co.*, 9 N.C. App. 140, 175 S.E.2d 725 (1970); *Coppley v. Carter*, 10 N.C. App. 512, 179 S.E.2d 118 (1971).

**And Evidence of Party Opposing Motion Must Be Taken as True.**—Upon defendant's motion for judgment non obstante veredicto all the evidence which supports plaintiffs' claim must be taken as true and considered in the light most favorable to plaintiffs, giving them the benefit of every reasonable inference which may legitimately be drawn therefrom, with contradictions, conflicts and inconsistencies being resolved in plaintiffs' favor. *Horton v. Iowa Mut. Ins. Co.*, 9 N.C. App. 140, 175 S.E.2d 725 (1970).

All of the evidence which supports the claim of the party opposing the motion must be taken as true and considered in the light most favorable to him, giving him the benefit of every reasonable inference which may legitimately be drawn therefrom, and with contradictions, conflicts and inconsistencies being resolved in his favor. *Coppley v. Carter*, 10 N.C. App. 512, 179 S.E.2d 118 (1971).

Insofar as the defendant's testimony creates a conflict in his testimony, it must be resolved in his favor in passing on the plaintiff's motion for judgment notwithstanding the verdict. *Coppley v. Carter*, 10 N.C. App. 512, 179 S.E.2d 118 (1971).

**Granting Judgment Notwithstanding Verdict Is Error if Case was Sufficient to Go to Jury.**—If the plaintiffs have made out

a case sufficient to go to the jury, then it is error to enter the judgment setting aside the verdict and granting a judgment for the defendant notwithstanding the verdict. *Horton v. Iowa Mut. Ins. Co.*, 9 N.C. App. 140, 175 S.E.2d 725 (1970).

**Granting of Motion Is Adjudication on the Merits.**—The granting of a motion for judgment notwithstanding the verdict constitutes an adjudication on the merits of a case. *Musgrave v. Mutual Sav. & Loan Ass'n*, 8 N.C. App. 385, 174 S.E.2d 820 (1970).

**Denial of a motion in the alternative for a new trial lies within the discretion of the trial judge**, and an action of the trial judge as to a matter within his judicial discretion will not be disturbed unless a clear abuse of discretion is shown. *Coppley v. Carter*, 10 N.C. App. 512, 179 S.E.2d 118 (1971).

**Applied in** *Pompey v. Hyder*, 9 N.C. App. 30, 175 S.E.2d 319 (1970); *Stewart v. Nation-Wide Check Corp.*, 9 N.C. App. 172, 175 S.E.2d 172 (1970); *Hull v. Winn-Dixie Greenville, Inc.*, 9 N.C. App. 234, 175 S.E.2d 607 (1970); *Allied Concord Financial Corp. v. Lane*, 9 N.C. App. 329, 176 S.E.2d 36 (1970); *Thomas v. Nationwide Mut. Ins. Co.*, 277 N.C. 329, 177 S.E.2d 286 (1970); *Continental Ins. Co. v. Foard*, 9 N.C. App. 630, 177 S.E.2d 431 (1970); *Walker v. Pless*, 11 N.C. App. 198, 180 S.E.2d 471 (1971); *King v. Lee*, 279 N.C. 100, 181 S.E.2d 400 (1971).

**Cited in** *Perry v. Suggs*, 9 N.C. App. 128, 175 S.E.2d 696 (1970); *Resort Dev. Co. v. Phillips*, 9 N.C. App. 158, 175 S.E.2d 782 (1970); *Samons v. Meymandi*, 9 N.C. 490, 177 S.E.2d 209 (1970); *Clott v. Greyhound Lines, Inc.*, 9 N.C. App. 604, 177 S.E.2d 438 (1970); *Cooper v. Floyd*, 9 N.C. App. 645, 177 S.E.2d 442 (1970); *Southern Ry. v. Hutton & Bourbonnais Co.*, 10 N.C. App. 1, 177 S.E.2d 901 (1970); *Crowder v. Jenkins*, 11 N.C. App. 57, 180 S.E.2d 482 (1971).

## Rule 51. Instructions to jury.

**Editor's Note.**—For comment on the North Carolina jury charge, present practice and future proposals, see 6 *Wake Forest Intra. L. Rev.* 459 (1970).

**Requirement of Former § 1-180 Continued by This Rule.**—The requirement of this rule that the judge "shall declare and explain the law arising on the evidence given in the case," is a continuation of the requirement previously contained in former § 1-180. *Terry v. Jim Walter Corp.*, 8 N.C. App. 637, 174 S.E.2d 354 (1970).

**Section 1-180 is now applicable only to criminal cases.** Civil cases are governed by section (a) of this rule, which incorporates

the substance of the section. *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970).

**The chief purpose of a charge is to aid the jury to understand clearly the case and arrive at a correct verdict.** *Turner v. Turner*, 9 N.C. App. 336, 176 S.E.2d 24 (1970).

**Thus, section (a) of this rule confers a substantial legal right.** *Turner v. Turner*, 9 N.C. App. 336, 176 S.E.2d 24 (1970).

**And Imposes Positive Duty on Trial Judge.**—Section (a) of this rule imposes upon the trial judge a positive duty. *Turner v. Turner*, 9 N.C. App. 336, 176 S.E.2d 24 (1970).



**Judge Must Declare and Explain Law Arising on the Evidence.**—It is incumbent upon the judge to declare and explain the law arising on the evidence as to all substantial features of the case, without any special prayer for instructions to that effect, and a mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient. The judge must bring into view the relations of the particular evidence adduced to the particular issues involved. This is what is meant by the expression that the judge must apply the facts to the law for the enlightenment of the jury. *Link v. Link*, 9 N.C. App. 135, 175 S.E.2d 735 (1970).

It is the duty of the trial court to declare and explain the law arising on the evidence as to all substantial features of the case, without any special prayer for instructions to that effect, and a mere declaration of the law in general terms and a statement of the contentions of the parties is insufficient. *Terry v. Jim Walter Corp.*, 8 N.C. App. 637, 174 S.E.2d 354 (1970).

The duty of the judge is to declare the law arising on the evidence and to explain the application of the law thereto. *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971).

Section (a) of this rule requires the judge to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. *Panhorst v. Panhorst*, 277 N.C. 664, 178 S.E.2d 387 (1971).

It is the duty of the court to charge the law applicable to the substantive features of the case arising on the evidence, without special request, and to apply the law to the various factual situations presented by the conflicting evidence. *Panhorst v. Panhorst*, 277 N.C. 664, 178 S.E.2d 387 (1971).

Where the jury is given no guidance as to what facts, if found by them to be true, would justify them in answering the sole issue submitted to them either in the affirmative or the negative, the trial judge has failed to comply with the mandate of section (a) of this rule. *American Credit Co. v. Brown*, 10 N.C. App. 382, 178 S.E.2d 649 (1971).

**The trial judge's failure to charge the law on the substantial features of the case arising on the evidence is prejudicial error.** *Turner v. Turner*, 9 N.C. App. 336, 176 S.E.2d 24 (1970).

In a personal injury action arising out of a collision it is error for the court to fail to instruct the jury what effect a finding of plaintiff's intoxication at the time of the collision would have upon the issue of

plaintiff's contributory negligence. *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970).

**And this is true even without prayer for special instructions.** *Turner v. Turner*, 9 N.C. App. 336, 176 S.E.2d 24 (1970).

**But Party Must Request Instructions on Subordinate Features of Case.**—Where the court adequately charges the law on every material aspect of the case arising on the evidence and applies the law fairly to the various factual situations presented by the evidence, the charge is sufficient and will not be held error for failure of the court to give instructions on subordinate features of the case, since it is the duty of a party desiring instructions on a subordinate feature, or greater elaboration, to aptly tender a request therefor. *Koutsis v. Waddel*, 10 N.C. App. 731, 179 S.E.2d 797 (1971).

**The judge is not required to declare and explain the law on a set of hypothetical facts.** *Terrell v. H. & N. Chevrolet Co.*, 11 N.C. App. 310, 181 S.E.2d 124 (1971).

**It is error for the trial court to charge the jury upon an abstract principle of law which is not presented by the allegations and evidence.** *Huggins v. Kye*, 10 N.C. App. 221, 178 S.E.2d 127 (1970).

**Use of Illustrations in Explaining Legal Principles.**—In explaining legal principles to a lay jury the trial judge's use of illustrations should be carefully guarded to avoid suggestions susceptible of inferences as to the facts beyond that intended. *Terrell v. H. & N. Chevrolet Co.*, 11 N.C. App. 310, 181 S.E.2d 124 (1971).

New trials have been awarded where illustrations or hypothetical references were deemed to constitute prejudicial error. *Terrell v. H. & N. Chevrolet Co.*, 11 N.C. App. 310, 181 S.E.2d 124 (1971).

**Statement of Contentions of the Parties.**—The trial court is not required to state the contentions of the parties, but when it undertakes to state the contentions of one party upon a particular phase of the case, it is incumbent upon the court to give the opposing contentions of the adverse party upon the same aspect. *Comer v. Cain*, 8 N.C. App. 670, 174 S.E.2d 337 (1970).

It is not required that the statement of contentions of the parties as stated by the court be of equal length. *Comer v. Cain*, 8 N.C. App. 670, 174 S.E.2d 337 (1970).

**No Error in Failure to Instruct as to Contention Not Supported by Evidence.**—There being no evidence to support a finding of ratification, there was no error prejudicial to the defendant in the failure of the trial court to instruct the jury as to the defendant's contention with respect there-



to. *Link v. Link*, 278 N.C. 181, 179 S.E.2d 697 (1971).

**The credibility of the witnesses and conflicts in the evidence are for the jury, not the court.** *Atkins v. Moye*, 277 N.C. 179, 176 S.E.2d 789 (1970).

The credibility of testimony is for the jury, not the court, and a genuine issue of fact must be tried by a jury unless this right is waived. *Cutts v. Casey*, 278 N.C. 390, 180 S.E.2d 297 (1971).

**And Failure to Permit Jury to Pass upon Credibility Is Prejudicial Error.**—The burden of proof on the issue of damages was on the plaintiff, and it was prejudicial error to fail to permit the jury to pass upon the credibility of the evidence. *Terrell v. H. & N. Chevrolet Co.*, 11 N.C. App. 310, 181 S.E.2d 124 (1971).

The vice in the judge's instruction to the jury that it should find damages "in the amount of \$507, there being no evidence to the contrary as to the amount," was that the jury was not permitted to pass upon the credibility of the evidence. *Terrell v. H. & N. Chevrolet Co.*, 11 N.C. App. 310, 181 S.E.2d 124 (1971).

**A peremptory instruction does not deprive the jury of its right to reject the evidence** because of lack of faith in its credibility. *Terrell v. H. & N. Chevrolet Co.*, 11 N.C. App. 310, 181 S.E.2d 124 (1971).

**Peremptory Instruction Not Abolished.**—The new Rules of Civil Procedure have not

abolished peremptory instructions in proper cases. *Terrell v. H. & N. Chevrolet Co.*, 11 N.C. App. 310, 181 S.E.2d 124 (1971).

**When Peremptory Instruction May Be Given.**—When all the evidence offered suffices, if true, to establish the controverted fact, the court may give a peremptory instruction—that is, if the jury find the facts to be as all the evidence tends to show, it will answer the inquiry in an indicated manner. Defendant's denial of an alleged fact raises an issue as to its existence even though he offers no evidence tending to contradict that offered by plaintiff. *Terrell v. H. & N. Chevrolet Co.*, 11 N.C. App. 310, 181 S.E.2d 124 (1971).

**The correct form of a peremptory instruction** is that the jury should answer the issue as specified if the jury should find from the greater weight of the evidence that the facts are as all the evidence tends to show. The court should also charge that if the jury does not so find they should answer the issue in the opposite manner. In other words, the court must leave it to the jury to decide the issue. *Terrell v. H. & N. Chevrolet Co.*, 11 N.C. App. 310, 181 S.E.2d 124 (1971).

**Applied** in *Hoffman v. Brown*, 9 N.C. App. 36, 175 S.E. 2d 388 (1970); *Peterson v. Taylor*, 10 N.C. App. 297, 178 S.E.2d 227 (1971).

**Stated** in *McLamb v. Brown Constr. Co.*, 10 N. C. App. 688, 179 S.E.2d 895 (1971).

## Rule 52. Findings by the court.

### Editor's Note.—

For article on the legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

### The judge who tries, etc.—

In cases in which the trial court passes on the facts, the court is required to do three things in writing: (1) To find the facts on all issues of fact joined on the pleadings; (2) to declare the conclusions of law arising on the facts found; and (3) to enter judgment accordingly. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

### Duty of Judge to Consider, etc.—

When trial by jury is waived and issues of facts are tried by the court, the trial judge becomes both judge and juror, and it is his duty to consider and weigh all the competent evidence before him. *Laughter v. Lambert*, 11 N.C. App. 133, 180 S.E.2d 450 (1971).

### The trial judge passes upon, etc.—

In accord with original. See *Laughter v. Lambert*, 11 N.C. App. 133, 180 S.E.2d 450 (1971).

### The trial judge determines, etc.—

In accord with original. See *Laughter v. Lambert*, 11 N.C. App. 133, 180 S.E.2d 450 (1971).

### Separate Conclusions, etc.—

When trial by jury is waived and issues of facts are tried by the court, the court is required to find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment. *Laughter v. Lambert*, 11 N.C. App. 133, 180 S.E.2d 450 (1971).

This rule requiring that the findings of fact be stated separately from the conclusions of law is satisfied when the separation is made in such a manner as to render the findings of fact readily distinguishable from the conclusions of law. *Jackson v. Collins*, 9 N.C. App. 548, 176 S.E.2d 878 (1970).

### Judge's Findings of Fact, etc.—

Where facts are found by the court, if supported by competent evidence, such facts are as conclusive on appeal as the verdict of a jury. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

When trial by jury is waived and issues of facts are tried by the court, the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary. *Laughter v. Lambert*, 11 N.C. App. 133, 180 S.E.2d 450 (1971).

The trial court's findings of fact are conclusive if supported by any competent evidence, and judgment supported by such findings will be affirmed, even though there is evidence contra, or even though some incompetent evidence may also have been admitted. *Little v. Little*, 9 N.C. App. 361, 176 S.E.2d 521 (1970).

When a jury trial is waived, the court's findings of fact have the force and effect of a verdict by a jury and are conclusive on appeal if there is evidence to support them, even though the evidence might sustain findings to the contrary. *Blackwell v. Butts*, 278 N.C. 615, 180 S.E.2d 835 (1971).

**But Sufficiency of Evidence to Support Judge's Findings May Be Questioned on Appeal.**—The question of the sufficiency of the evidence to support the trial court's findings of fact may be raised on appeal. *Little v. Little*, 9 N.C. App. 361, 176 S.E.2d 521 (1970).

**Judge's Findings of Fact Are Conclusive in Action for Permanent Restraining Order.**—When the purpose of the action is a permanent restraining order, the trial court's findings of fact are binding on appeal, if supported by the evidence. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

**But Not in Action Involving Temporary Restraining Order.**—In cases involving a temporary rather than a permanent restraining order, the court's findings of fact are not binding on the appellate court which may make its own findings. *Coggins v. City of Asheville*, 278 N.C. 428, 180 S.E.2d 149 (1971).

The posing and answering of issues by

## Rule 53. Referees.

### Editor's Note.—

For article on the legislative changes to the new Rules of Civil Procedure, see 6 Wake Forest Intra. L. Rev. 267 (1970).

### Right to Jury Trial.—

In accord with 14th paragraph in original. See *Resort Dev. Co. v. Phillips*, 9 N.C. App. 158, 175 S.E.2d 782 (1970).

A compulsory reference, under provisions of former § 1-189, did not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial was only upon

the court when it sits without a jury is not approved. *Gibson v. Jones*, 7 N.C. App. 534, 173 S.E.2d 57 (1970).

### Verdict on Issues, etc.—

The entry of a verdict by the trial court, sitting without a jury, based on issues of fact answered by the court is not approved. *Gibson v. Jones*, 7 N.C. App. 534, 173 S.E.2d 57 (1970).

**Findings of Fact upon Application for Alimony Pendente Lite.**—The provision of section (a)(2) that the trial judge is not required to make findings of fact unless requested to do so by a party does not abrogate the specific requirement of § 50-16.8(f) that the trial judge shall make findings of fact upon an application for alimony pendente lite, since the Rules of Civil Procedure are of general application and do not abrogate the requirements of a statute of more specificity. *Hatcher v. Hatcher*, 7 N.C. App. 562, 173 S.E.2d 33 (1970).

This rule does not apply in awarding alimony pendente lite. *Peoples v. Peoples*, 10 N.C. App. 402, 179 S.E.2d 138 (1971).

### Sufficient Compliance.—

Where, instead of stating separately his conclusions of law, the trial judge answered issues of negligence and contributory negligence, these answers were treated as the equivalent of stated conclusions of law (1) that plaintiff was damaged by the negligence of defendant, and (2) that plaintiff did not by his own negligence contribute to his own damage. *Blackwell v. Butts*, 278 N.C. 615, 180 S.E.2d 835 (1971).

Applied in *Perry v. Suggs*, 9 N.C. App. 128, 175 S.E.2d 696 (1970); *Thorne v. Thorne*, 10 N.C. App. 151, 178 S.E.2d 33 (1970); *Bryant v. Kelly*, 10 N.C. App. 208, 178 S.E.2d 113 (1970).

Cited in *Fox v. Miller*, 8 N.C. App. 29, 173 S.E.2d 607 (1970); *Sawyer v. Shackelford*, 8 N.C. App. 631, 174 S.E.2d 305 (1970); *Walker v. Pless*, 11 N.C. App. 198, 180 S.E.2d 471 (1971).

the written evidence taken before the referee. *Resort Dev. Co. v. Phillips*, 278 N.C. 69, 178 S.E.2d 813 (1971).

Section (b)(2) provides that a reference does not deprive a party of a jury trial and sets out the steps to be followed to preserve the right. *Porter Bros. v. Jones*, 11 N.C. App. 215, 181 S.E.2d 177 (1971).

Where the trial of an issue requires the examination of a complicated account the trial court may, upon its own motion, order a reference. *Porter Bros. v. Jones*, 11 N.C. App. 215, 181 S.E.2d 177 (1971).



**Failure to Formulate Appropriate Issues Based on Exceptions Constitutes Waiver.**

—Having failed to formulate appropriate issues based upon the exceptions taken,

defendants waived their right to jury trial. *Porter Bros. v. Jones*, 11 N.C. App. 215, 181 S.E.2d 177 (1971).

ARTICLE 7.

*Judgment.*

**Rule 55. Default.**

(b) *Judgment.*—Judgment by default may be entered as follows:

- (1) By the Clerk.—When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person. A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain.

In all cases wherein, pursuant to this rule, the clerk enters judgment by default upon a claim for debt which is secured by any pledge, mortgage, deed of trust, or other contractual security in respect of which foreclosure may be had, or upon a claim to enforce a lien for unpaid taxes or assessments under G.S. 105-414, the clerk may likewise make all further orders required to consummate foreclosure in accordance with the procedure provided in Article 29A of Chapter 1 of the General Statutes, entitled "Judicial Sales."

- (2) By the Judge.—In all other cases the party entitled to a judgment by default shall apply to the judge therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a guardian ad litem or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least three days prior to the hearing on such application. If, in order to enable the judge to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to take an investigation of any other matter, the judge may conduct such hearings or order such references as he deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by the Constitution or by any statute of North Carolina.

(c) *Service by publication.*—When service of the summons has been made by published notice, no judgment shall be entered on default until the plaintiff shall have filed a bond, approved by the court, conditioned to abide such order as the court may make touching the restitution of any property collected or obtained by virtue of the judgment in case a defense is thereafter permitted and sustained; provided, that in actions involving the title to real estate or to foreclosure mortgages thereon such bond shall not be required.

(1971, cc. 542, 1101.)

**Editor's Note.** — The first 1971 amendment deleted "or without the State" in the catchline to section (c).

The second 1971 amendment added the last sentence in the first paragraph of subsection (1) of section (b).

As the rest of this rule was not changed by the amendments, only sections (b) and (c) are set out.

For article on modern statutory approaches to service of process outside the State, see 49 N.C.L. Rev. 235 (1971).



This rule appears to be a counterpart of Federal Rule 55. *Rawleigh, Moses & Co. v. Capital City Furniture, Inc.*, 9 N.C. App. 640, 177 S.E.2d 332 (1970).

**Default Established by Defendant's Failure to Answer.**—Under Rule 8(d) the defendant, by failing to answer, admitted that plaintiff was entitled to the possession of the real property. The default was thus established. *North Am. Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

If the default is established, the defendant has no further standing to contest the merits of plaintiff's right to recover. His only recourse is to show good cause for setting aside the default and, failing that, to contest the amount of the recovery. *North Am. Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

**Judgment against Nonappearing Defendant.**—In order for a valid judgment to be entered in an action against a nonappearing defendant, there must be compliance with the provisions of this rule, as well as § 1-75.11. *Hill v. Hill*, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

The true mode of proceeding where a bill makes a joint charge against several defendants, and one of them makes default, is simply to enter a default and a formal decree pro confesso against him, and proceed with the cause upon the answers of the other defendants. The defaulting defendant has merely lost his standing in court. *Rawleigh, Moses & Co. v. Capital City Furniture, Inc.*, 9 N.C. App. 640, 177 S.E.2d 332 (1970).

If an alleged liability is joint, a default judgment should not be entered against a defaulting defendant until all of the defendants have defaulted; or if one or more do not default then, as a general proposition, entry of judgment should await an adjudication as to the liability of the nondefaulting defendant(s). This rule may also be applied with propriety where the liability is both joint and several or is in some other respect closely interrelated. These are properly procedural rules whose objective is to attain a correct application of substantive law. *Rawleigh, Moses & Co. v. Capital City Furniture, Inc.*, 9 N.C. App. 640, 177 S.E.2d 332 (1970).

Where there are several defendants a question may arise as to whether, after entry of a default against one, a default judgment can be entered immediately against the defaulting defendant or whether entry must be postponed until all the defendants are in default or the case is tried as to the defendants not in default. The

latter alternative is the correct procedure where the liability of the defendants is joint. *Rawleigh, Moses & Co. v. Capital City Furniture, Inc.*, 9 N.C. App. 640, 177 S.E.2d 332 (1970).

**Effect on Defaulting Defendant of Adjudication for or against Defending Party.**—In a nonfederal matter the effect upon a defaulting defendant of an adjudication in favor of or against a defending party should, it seems, be a subject for state law to determine; and a subject to be determined independently of state law in a federal matter. *Rawleigh, Moses & Co. v. Capital City Furniture, Inc.*, 9 N.C. App. 640, 177 S.E.2d 332 (1970).

Where joint liability is involved, a successful defense, other than a personal one, inures to the benefit of a defaulting defendant. *Rawleigh, Moses & Co. v. Capital City Furniture, Inc.*, 9 N.C. App. 640, 177 S.E.2d 332 (1970).

If the suit should be decided against the complainant on the merits, the bill will be dismissed as to all the defendants alike—the defaulter as well as the others. *Rawleigh, Moses & Co. v. Capital City Furniture, Inc.*, 9 N.C. App. 640, 177 S.E.2d 332 (1970).

If joint liability is decided against a plaintiff on the merits or that he has no present right of recovery, as distinguished from an adjudication for the nondefaulting defendant on a defense personal to him, the complaint should be dismissed as to all of the defendants—both the defaulting and the nondefaulting defendants. *Rawleigh, Moses & Co. v. Capital City Furniture, Inc.*, 9 N.C. App. 640, 177 S.E.2d 332 (1970).

Where the liability is joint and several or closely interrelated and a defending party establishes that plaintiff has no cause of action or present right of recovery, this defense generally inures also to the benefit of a defaulting defendant. *Rawleigh, Moses & Co. v. Capital City Furniture, Inc.*, 9 N.C. App. 640, 177 S.E.2d 332 (1970).

If joint liability is decided against a defending party and in favor of the plaintiff, plaintiff is then entitled to a judgment against all of the defendants—both the defaulting and nondefaulting defendants. *Rawleigh, Moses & Co. v. Capital City Furniture, Inc.*, 9 N.C. App. 640, 177 S.E.2d 332 (1970).

If the suit is decided in the complainant's favor, he will then be entitled to a final decree against all defendants—the defaulter as well as the others. *Rawleigh, Moses & Co. v. Capital City Furniture, Inc.*, 9 N.C. App. 640, 177 S.E.2d 332 (1970).



**A motion to set aside a default or a judgment by default is addressed to the discretion of the court.** North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

The determination of whether an adequate basis exists for setting aside the entry of default and the judgment by default rests in the sound discretion of the trial judge. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

**Discretion Not Abused.**—Where the defendant did not offer any evidence showing a good reason for her default upon which the judge could have set aside the entry of default; nor was there an adequate basis shown for the judge to have set aside the judgment by default on the grounds of mistake, inadvertence, surprise, excusable neglect or meritorious defense, the judge did not abuse her discretion in failing to set aside the entry of default or the judgment by default. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

**An adequate basis for the motion must be shown.** North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

**Default Judgments Not Favored.**—In exercising its discretion the court will be guided by the fact that default judgments are not favored in the law. North Am. Acceptance Corp. v. Samuels, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

**An entry of default is to be distinguished from a judgment by default.** Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

The “entry of default” has been characterized as a ministerial duty. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

**An entry is only an interlocutory act looking toward the subsequent entry of a final judgment by default and is more in the nature of a formal matter.** Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

**And Might Be Set Aside on Showing That Would Not Justify Setting Aside Judgment.**—A court might feel justified in setting aside an entry of default on a showing that would not move it to set aside a default judgment. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

The rules evidently make a distinction between what is required to make a good case for setting aside a default and what is required to set aside a judgment. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

**First Clause of Section (d) Governs Motion to Vacate Entry of Default.**—A default but no judgment having been entered, the motion to vacate the default is governed by the first clause of section (d) of this rule. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

**A motion to set aside a default is addressed to the discretion of the court.** Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

It is clear, under the federal cases, that a determination of whether or not good cause exists rests in the sound discretion of the trial judge, and that the facts and circumstances of the particular case govern. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

There would be no reason for the distinction between setting aside an entry of default and setting aside a default judgment unless section (d) of this rule intended to commit the matter of setting aside an entry of default entirely to the discretion of the court, to be exercised, of course, within the usual discretionary limits. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

**Any doubt should be resolved in favor of setting aside defaults** so that the cases may be decided on their merits. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

**To set aside a default all that need be shown is good cause.** Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

Where the facts of a case are sufficient to warrant a conclusion by the trial judge that a defendant has shown good cause for his failure to file an answer, the action of a trial judge in vacating the entry of default must be upheld. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

**Inadvertence, even if not strictly “excusable,” may constitute good cause,** particularly in a case where the plaintiff can suffer no harm from the short delay involved in the default and grave injustice may be done to the defendant. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

**There is no necessity for a finding of excusable neglect in granting a motion to set aside and vacate the entry of default.** Hence a plaintiff’s assignment of error directed at a trial judge’s conclusion that excusable neglect existed is to no avail, and such finding is surplusage and though erroneous is not prejudicial. Whaley v. Rhodes, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

**Default Set Aside.**—In view of the lack of any substantial prejudice to plaintiff, the



claim of a meritorious defense, and the absence of any gross neglect on the part of defendant, the default was set aside. *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

The rule as to what is required to set aside a judgment specifies "mistake, inadvertence, surprise, or excusable neglect." This has been construed to mean that the mistake, inadvertence, or surprise, as well as neglect, must be excusable in order to give the court the power to set aside the judgment. *Whaley v. Rhodes*, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

**Meritorious Defense and Good Reason for Default Must Be Shown.**—The court should not reopen a default judgment merely because the party in default re-

quests it, but should require the party to show both that there was a good reason for the default and that he has a meritorious defense to the action. *North Am. Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

The fact that defendant has a meritorious defense does not justify setting the judgment aside if no good excuse for the default is shown; and the merits of the controversy will not be considered unless an adequate reason for the default is shown. *North Am. Acceptance Corp. v. Samuels*, 11 N.C. App. 504, 181 S.E.2d 794 (1971).

Quoted in *Kirby v. Asheville Contracting Co.*, 11 N. C. App. 128, 180 S.E.2d 407 (1971).

## Rule 56. Summary judgment.

The text of this rule and that of Federal Rule 56 are practically the same. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E.2d 425 (1970); *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**Federal Rule 56 eliminated earlier restrictions** and made the procedure of summary judgment available to both plaintiff and defendant in all types of cases to which the federal rules are applicable. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E.2d 425 (1970).

**Motion for Summary Judgment Is a New Procedure.**—The motion for summary judgment under this rule is a procedure new to the courts of this State. *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E.2d 1 (1970).

Summary judgment is a new procedure in North Carolina. *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

Summary judgment may encompass more than a demurrer. *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

But it often arises in the same manner and has the same effect as the former practice with the demurrer. *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

**Unlike Demurrer, Motion Allows Court to Consider Matter outside Complaint.**—A demurrer was a proper method of testing the legal sufficiency of the complaint, but it was confined only to the complaint itself. A motion for summary judgment allows the court to consider matter outside of the complaint for the purpose of ascertaining whether a genuine issue of fact does exist. This recognizes the fact that a genuine issue of fact may not exist, even though one may appear in the complaint which is well pleaded. *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

**Motions under Rules 12(b)(6) and 12(c) can be treated as summary judgment mo-**

tions, the difference being that under Rules 12(b)(6) and 12(c) the motion is decided on the pleadings alone, while under this rule the court may receive and consider various kinds of evidence. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**Summary Judgment Not Precluded by Earlier Denial of Motion under Rule 12(b)(6).**—The denial of a motion to dismiss for failure to state a claim upon which relief can be granted, which merely challenges the sufficiency of the complaint, does not prevent the court's allowing a subsequent motion for summary judgment based on affidavits outside the complaint. *Alltop v. J.C. Penney Co.*, 10 N.C. App. 92, 179 S.E.2d 885 (1971).

**Acting on Motion where Interrogatories Unanswered.**—Although unanswered interrogatories will not, in every case, bar the trial court from acting on motion for summary judgment, doing so prior to the filing of objections or answer to the interrogatories is improper. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

**Rule Must Be Used Cautiously.**—Since this rule provides a somewhat drastic remedy, it must be used with due regard to its purposes and a cautious observance of its requirements in order that no person shall be deprived of a trial on a genuine disputed factual issue. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

Summary judgment is an extreme remedy and should be cautiously invoked to the end that parties will always be afforded a trial where there is a genuine dispute of facts between them. *Moore v. Bryson*, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

Summary judgment is an extreme remedy and should be awarded only where



the truth is quite clear. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

**Right to Judgment as a Matter of Law Must Appear.**—In order for the granting of plaintiff's motion for summary judgment to be appropriate, it must appear from the items submitted in support of plaintiff's motion that the plaintiff was entitled to judgment as a matter of law. *Atkinson v. Wilkerson*, 10 N.C. App. 643, 179 S.E.2d 872 (1971).

**Summary judgments should be looked upon with favor where no genuine issue of material fact is presented.** *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**This rule is not limited in its application to any particular type or types of action.** *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E.2d 425 (1970); *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**And the procedure is available to both plaintiff and defendant.** *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E.2d 425 (1970); *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**Two types of cases are involved:** (a) those where a claim or defense is utterly baseless in fact, and (b) those where only a question of law on the indisputable facts if in controversy and it can be appropriately decided without full exposure of trial. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**It is only in the exceptional negligence case that this rule should be invoked.** This is so because even in a case in which there may be no substantial dispute as to what occurred, it usually remains for the jury, under appropriate instructions from the court, to apply the standard of the reasonably prudent man to the facts of the case in order to determine where the negligence, if any, lay, and what was the proximate cause of the aggrieved party's injuries. *Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E.2d 147 (1971).

While neither the federal rules nor this rule excludes the use of the summary judgment procedure in negligence actions, it is generally conceded that summary judgment will not usually be as feasible in negligence cases where the standard of the prudent man must be applied. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E.2d 425 (1970); *Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E.2d 147 (1971).

While summary judgment will often not be feasible in negligence cases where the standard of the prudent man must be applied, it is proper in such cases where it

appears that there can be no recovery even if the facts as claimed by plaintiff are proved. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E.2d 425 (1970).

**The purpose of the summary judgment rule** is to provide an expeditious method for determining whether a material issue of fact actually exists. *Alltop v. J.C. Penney Co.*, 10 N.C. App. 692, 179 S.E.2d 885 (1971).

The purpose of the summary judgment rule is to provide an expeditious method for determining whether any disputed material issue of fact does actually exist. *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E.2d 1 (1970); *Blackmon v. Valley Decorating Co.*, 11 N.C. App. 137, 180 S.E.2d 396 (1971).

It is the purpose of the summary judgment procedure to determine if disputed material issues of fact exist. *Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E.2d 147 (1971).

The purpose of summary judgment can be summarized as being a device to bring litigation to an early decision on the merits without the delay and expense of a trial where it can be readily demonstrated that no material facts are in issue. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

The purpose of the summary judgment procedure provided by this rule is to ferret out those cases in which there is no genuine issue as to any material fact and in which, upon such undisputed facts, a party is entitled to judgment as a matter of law. *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 179 S.E.2d 865 (1971); *Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E.2d 147 (1971).

The purpose of this rule is to eliminate formal trials where only questions of law are involved. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

Summary judgment is to avoid a useless trial. It is a device to make possible the prompt disposition of controversies on their merits without a trial, if in essence there is no real dispute as to the salient facts. While a day in court may be a constitutional necessity when there are disputed questions of fact, the function of the motion of summary judgment is to smoke out if there is any case, i.e., any genuine dispute as to any material fact, and, if there is no case, to conserve judicial time and energy by avoiding an unnecessary trial and by providing a speedy and efficient summary disposition. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E.2d 425 (1970).

This rule is for the disposition of cases



where there is no genuine issue of fact. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**The purpose of the rule is not to resolve a disputed material issue of fact**, if one exists. *Patterson v. Reid*, 10 N. C. App. 22, 178 S.E.2d 1 (1970); *Blackmon v. Valley Decorating Co.*, 11 N.C. App. 137, 180 S.E.2d 396 (1971).

It is not the purpose of the summary judgment procedure to resolve disputed material issues of fact. *Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E.2d 147 (1971).

**Court's Function on Motion for Summary Judgment.**—Upon a motion for summary judgment it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970); *Moore v. Bryson*, 11 N.C. App. 260, 181 S.E.2d 113 (1971).

**Test Is Whether There Is Genuine Issue as to Material Fact.**—Where a motion for summary judgment is made and is supported by matters outside the pleadings, the test is whether on the basis of the materials presented to the court there is any genuine issue as to any material fact. *Alltop v. J.C. Penney Co.*, 10 N.C. App. 692, 179 S.E.2d 885 (1971).

**Motion Granted Only Where No Such Issue Appears.**—Summary judgment is proper only when the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

**And Presence of Difficult Question of Law Is No Barrier.**—Where there is no genuine issue as to the facts, the presence of important or difficult questions of law is no barrier to the granting of summary judgment. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**The determination of what constitutes a "genuine issue as to any material fact" in section (c) is often difficult.** *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**A genuine issue is one which can be maintained by substantial evidence.** *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**When Issue Is Material.**—An issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is re-

solved may not prevail. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**A question of fact which is immaterial does not preclude summary judgment.** *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**The burden is on the moving party to establish the lack of a triable issue of fact.** *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E.2d 425 (1970); *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 179 S.E.2d 865 (1971); *Moore v. Bryson*, 11 N.C. App. 260, 181 S.E.2d 113 (1971); *Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E.2d 147 (1971).

**And Court Must View Record in Light Most Favorable to Opposing Party.**—When motion for summary judgment is made, the court must look at the record in the light most favorable to the party opposing the motion. *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E.2d 1 (1970); *Blackmon v. Valley Decorating Co.*, 11 N. C. App. 137, 180 S.E.2d 396 (1971).

**Granting of summary judgment where the adverse party does not respond to the motion "by affidavits or as otherwise provided in this rule" is proper only "if appropriate" under all of the circumstances of the case.** *Robinson v. McMahan*, 11 N.C. App. 275, 181 S.E.2d 147 (1971).

**Even Unopposed Evidence Supporting Motion May Not Be Sufficient.**—The evidentiary matter supporting the moving party's motion may not be sufficient to satisfy his burden of proof, even though the opposing party fails to present any competent counteraffidavits or other materials. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E.2d 425 (1970).

**Statements in Affidavits May Not Suffice because Acceptance Depends on Credibility.**—Affidavits in a motion for summary judgment do not supply all the needed proof. The statements in the affidavits may not suffice, because their acceptance as proof depends on credibility. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

**A court should not resolve an issue of credibility or conduct a "trial by affidavits" at a hearing on a motion for summary judgment, especially in cases where knowledge of the fact is largely under the control of the movants.** *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

**Absent an unequivocal waiver of a trial on oral testimony, credibility ought not, when witnesses are available, be determined by mere paper affirmations or denials that inherently lack the important element of witness' demeanor.** *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970).



Particularly where the facts are peculiarly in the knowledge of defendants or their witnesses, should the plaintiff have the opportunity to impeach them at a trial; and their demeanor may be the most effective impeachment. Indeed, it has been said that a witness' demeanor is a kind of "real evidence," and obviously such "real evidence" cannot be included in affidavits. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

**A summary judgment may not be used to withdraw witnesses from cross-examination**, the best method yet devised for testing trustworthiness of testimony; there are many things sometimes in the conduct of a witness upon the stand, and sometimes in the mode in which his answers are drawn from him through the questioning of counsel, by which a jury are to be guided in determining the weight and credibility of his testimony. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

**Credibility of Testimony of Interested Witness Submitted to Jury.**—The fact that the witness is interested in the result of the suit has been held to be sufficient to require the credibility of his testimony to be submitted to the jury. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

**If there is any question as to the credibility of witnesses or the weight of evidence, a summary judgment should be denied.** *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**Party Opposing Properly Supported Motion May Not Rely on Bare Allegations of His Pleading.**—If the defendant moving for summary judgment successfully carries his burden of proof, the plaintiff may not rely upon the bare allegations of his complaint to establish triable issues of fact. *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 179 S.E.2d 865 (1971).

In order to show that there is a genuine issue as to facts contained in defendants' affidavits filed in support of their motion for summary judgment which, if established, would defeat a plaintiff's claim, plaintiff may not rest upon the mere allegations of her pleading. *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E. 2d 1 (1970).

Section (e) of this rule clearly states that the unsupported allegations in a pleading are insufficient to create a genuine issue of fact where the moving adverse party supports his motion by allowable evidentiary matter showing the facts to be contrary to that alleged in the pleadings. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E.2d 425 (1970).

**But Must Set Forth Specific Facts Showing Genuine Issue.**—If the defendant mov-

ing for summary judgment successfully carries his burden of proof, the plaintiff must, by affidavits or otherwise, set forth specific facts showing that there is a genuine issue for trial. *Haithcock v. Chimney Rock Co.*, 10 N.C. App. 696, 179 S.E.2d 865 (1971).

In order to show that there is a genuine issue as to facts contained in defendants' affidavits filed in support of their motion for summary judgment which, if established, would defeat a plaintiff's claim, plaintiff's response, by affidavits or otherwise as provided in this rule, "must set forth specific facts showing that there is a genuine issue for trial." *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E.2d 1 (1970).

**Evidence which may be considered under this rule** includes admissions in the pleadings, depositions on file, answers to Rule 33 interrogatories, admissions on file whether obtained under Rule 36 or in any other way, affidavits, and any other material which would be admissible in evidence or of which judicial notice may properly be taken. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

**Affidavit statements based on hearsay would not be admissible** in evidence and should not be considered in passing on a motion for summary judgment. *Patterson v. Reid*, 10 N.C. App. 22, 178 S.E.2d 1 (1970).

**Parties Entitled to Any Presumption Applicable to Facts before Court.**—Upon a motion for summary judgment both the opposing and moving parties are entitled to any presumption that is applicable to the facts before the court. *Lee v. Shor*, 10 N.C. App. 231, 178 S.E.2d 101 (1970).

**There is a sound reason for the mandatory form in which the 10-day notice requirement is expressed** in this rule. *Ketner v. Rouzer*, 11 N.C. App. 483, 182 S.E.2d 21 (1971).

**Opposing Party Entitled to Opportunity to Develop Facts More Fully.**—The party opposing the motion is entitled to the opportunity, which compliance with the 10-day notice provision of this rule would provide, to develop the facts more fully. *Ketner v. Rouzer*, 11 N.C. App. 483, 182 S.E.2d 21 (1971).

**Judgment Reversed Where Notice Requirement Not Met.**—Because it was entered without prior notice of the motion as required by this rule, the summary judgment appealed from was reversed. *Ketner v. Rouzer*, 11 N.C. App. 483, 182 S.E.2d 21 (1971).

**Ten-Day Requirement Held Not Waived.**—Where defendants' motion for summary



judgment was not served on plaintiff "at least 10 days before the time fixed for the hearing" as required by this rule, but was made without any prior notice during the course of the pretrial hearing at which the summary judgment dismissing plaintiff's action was rendered, plaintiff's stipulation made at that hearing to the effect that his testimony and evidence "would be as set out in the complaint" did not constitute a waiver of the requirement of this rule that the motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." *Ketner v. Rouzer*, 11 N.C. App. 483, 182 S.E.2d 21 (1971).

**-Denial of Motion Not Ordinarily Appealable.**—Ordinarily, the denial of a motion for summary judgment does not affect a substantial right so that an appeal may be taken, but the moving party is free to preserve his exception for consideration on appeal from the final judgment. To allow an appeal from a denial of a motion for summary judgment would open the floodgate of fragmentary appeals and cause a delay in administering justice. *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

The denial of a motion by a defendant for summary judgment has the same effect as the overruling of a demurrer, and thus falls within the purview of Rule 4(a) of the Rules of Practice in the Court of Appeals. *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

A denial of a motion by a defendant for summary judgment has the same effect as the overruling of a demurrer, in that the movant has suffered no great harm as the trial continues, and the movant is allowed to preserve his exception to the denial of the motion for consideration on appeal from the final judgment. *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

The Court of Appeals dismissed as fragmentary an appeal from a denial of a motion for summary judgment. *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

**But Certiorari Is Available Where Substantial Right Is Thought to Be Affected.**—In case a substantial right is thought to be affected to the prejudice of the movant, then a petition for a writ of certiorari is available. *Motyka v. Nappier*, 9 N.C. App. 579, 176 S.E.2d 858 (1970).

If the plaintiff's claim is barred by the running of the statute of limitations, defendant is entitled to judgment as a matter of law and summary judgment is appropriate. *Brantley v. Dunstan*, 10 N.C. App. 706, 179 S.E.2d 878 (1971).

If the moving party by affidavit or otherwise presents materials which would require a directed verdict in his favor, if presented at trial, then he is entitled to summary judgment unless the opposing party either shows that affidavits are then unavailable to him, or he comes forward with some materials, by affidavit or otherwise, that show there is a triable issue of material fact. He need not, of course, show that the issue would be decided in his favor. But he may not hold back his evidence until trial; he must present sufficient materials to show that there is a triable issue. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E.2d 425 (1970).

The test is whether the moving party, by affidavit or otherwise, presents materials which would require a directed verdict in his favor if presented at trial. *Haitchcock v. Chimney Rock Co.*, 10 N.C. App. 696, 179 S.E.2d 865 (1971).

Where the parties were in agreement as to all the factual particulars concerning the making and the terms of a loan, there was no "genuine issue as to any material fact," and the effect of the undisputed facts was a question of law for the court to determine. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

Where the materials presented in support of defendant's motion for summary judgment showed that plaintiff had suffered no compensable injury or damage, the entry of summary judgment was proper since there appeared to be no genuine issue as to any material fact. *Alltop v. J.C. Penney Co.*, 10 N.C. App. 692, 179 S.E.2d 885 (1971).

Where the pleadings or proof of either party disclose that no cause of action or defense exists, a summary judgment may be granted. *Kessing v. National Mtg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

Summary judgment is proper where it appears that even if the facts as claimed by a plaintiff are proved, there can be no recovery, thus providing a device for identifying the factually groundless claim or defense. *Pridgen v. Hughes*, 9 N.C. App. 635, 177 S.E.2d 425 (1970).

Defendant having admitted the contract and his failure to perform, plaintiff was entitled to summary judgment unless the facts alleged in the further answer constitute a valid defense. *Williford v. Williford*, 10 N.C. App. 451, 179 S.E.2d 114 (1971).

**Genuine Issue Not Shown.**—Where the plaintiff had taken advantage of the discovery procedures available and had still been unable to obtain evidence as to when and how the injury occurred and who or



what caused it and the record did not reveal that any injury in the nature of an inflicted harm occurred, and the condition of the plaintiff could just as well have been from a pathological cause, then there was an absence of a showing that there was a genuine issue as to any material fact and summary judgment was appropriate. *Hoover v. Gaston Mem. Hosp.*, 11 N.C. App. 119, 180 S.E.2d 479 (1971).

**Applied in** *Roten v. State*, 8 N.C. App. 643, 174 S.E.2d 384 (1970); *Lane v. Faust*, 9 N.C. App. 427, 176 S.E.2d 381 (1970); *Vogel v. Reed Supply Co.*, 277 N.C. 119, 177

S.E.2d 273 (1970); *Hajoca Corp. v. Clayton*, 277 N.C. 560, 178 S.E.2d 481 (1971); *Williams v. Lewis*, 11 N.C. App. 306, 181 S.E.2d 234 (1971).

**Quoted in** *Moore v. Bryson*, 11 N.C. App. 149, 180 S.E.2d 437 (1971).

**Cited in** *Robbins v. Bowman*, 9 N.C. App. 416, 176 S.E.2d 346 (1970); *Jernigan v. Lee*, 9 N.C. App. 582, 176 S.E.2d 899 (1970); *Beasley v. Hartford Accident & Indem. Co.*, 11 N.C. App. 34, 180 S.E.2d 381 (1971); *Crowder v. Jenkins*, 11 N.C. App. 57, 180 S.E.2d 482 (1971).

## Rule 57. Declaratory judgments.

**Quoted in** *North Carolina Monroe Constr. Co. v. Guilford County Bd. of Educ.*, 278 N.C. 633, 180 S.E.2d 818 (1971).

## Rule 59. New trials; amendment of judgments.

**Rule 59 of the Federal Rules of Civil Procedure is comparable to this rule.** *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

**A motion to set aside the verdict and for a new trial is addressed to the sound discretion of the trial judge**, whose ruling, in the absence of abuse of discretion, is not reviewable on appeal. *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

**A timely motion for new trial is addressed to the sound judicial discretion of the trial court.** *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

**The trial judge has discretionary power to set aside an award of damages if he believes that the damages were excessive and given under the influence of passion or prejudice, or if the evidence is insufficient**

to justify the verdict. A ruling that is within the discretion of a trial judge may not be set aside except upon a showing of abuse of discretion. *Samons v. Meymandi*, 9 N.C. App. 490, 177 S.E.2d 209 (1970).

**Court Need Not Specify Grounds for Order Allowing Litigant's Motion.**—The trial court is not required to specify the grounds for its order allowing a litigant's motion to set aside a verdict and grant a new trial, where the order is not entered on the trial court's own initiative. *Glen Forest Corp. v. Bensch*, 9 N.C. App. 587, 176 S.E.2d 851 (1970).

**Applied in** *Horton v. Iowa Mut. Ins. Co.*, 9 N.C. App. 140, 175 S.E.2d 725 (1970).

**Cited in** *Musgrave v. Mutual Sav. & Loan Ass'n*, 8 N.C. App. 385, 174 S.E.2d 820 (1970).

## Rule 60. Relief from judgment or order.

### I. IN GENERAL.

**This rule replaces former § 1-220.** *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 180 S.E.2d 407 (1971).

**And the cases interpreting former § 1-220 are still applicable.** *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 180 S.E.2d 407 (1971).

**The provisions of former § 1-220 are now incorporated in this rule.** *Williams Lumber Co. v. Taylor*, 8 N.C. App. 255, 274 S.E.2d 109 (1970).

**The procedure under section (b) is analogous to the former practice under § 1-220 and under motions to set aside an irregular judgment.** *Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E.2d 446 (1971).

### Excusable Neglect, etc.—

Unless the judge finds that there was ex-

cusable neglect, and this finding is correct as a matter of law, he is not authorized to set aside the judgment. *Doxol Gas of Angier, Inc. v. Barefoot*, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

Where the facts found in an order setting aside a default judgment did not, as a matter of law, constitute excusable neglect, and the defendant failed to show and there was no finding that he had any meritorious defense, the order was erroneous. *Doxol Gas of Angier, Inc. v. Barefoot*, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

**Excusable Neglect Has Long Been Recognized.**—Although the ground of excusable neglect is set forth in this rule, it has long been recognized in this jurisdiction and the Supreme Court has spoken on the subject many times. *Rawleigh, Moses*



& Co. v. Capital City Furniture, Inc., 9 N.C. App. 640, 177 S.E.2d 332 (1970).

**Relief Will Not Be Granted Where Neglect Is Inexcusable.**—The exceptional relief of this rule (replacing former § 1-220) to set aside a judgment for mistake, inadvertence, surprise, or excusable neglect will not be granted where there is inexcusable neglect on the part of the litigant. A lawsuit is a serious matter. He who is a party to a case in court "must give it that attention which a prudent man gives to his important business." *Holcombe v. Bowman*, 8 N.C. App. 673, 174 S.E.2d 362 (1970).

**Meritorious Defense, etc.**—

Even when the facts found justify a conclusion that the neglect was excusable, the court cannot set aside the judgment unless there is a meritorious defense, for it would be idle to vacate a judgment where there is no real or substantial defense on the merits. *Doxol Gas of Angier, Inc. v. Barefoot*, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

Even if there is evidence from which a finding of excusable neglect can be made, case law requires a finding of a meritorious defense before the judgment may be set aside. *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 180 S.E.2d 407 (1971).

**Whether the neglect is excusable, etc.**—

In accord with 2nd paragraph in original. See *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 180 S.E.2d 407 (1971).

The excusability of the neglect on which relief is granted is that of the litigant, not that of the attorney. *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 180 S.E.2d 407 (1971).

**Relief from Execution Sale.**—A motion in the cause is not an improper procedure for seeking relief from an execution sale under the judgment. *Witten Supply Co. v. Redmond*, 11 N.C. App. 173, 180 S.E.2d 487 (1971).

**Attention Required, etc.**—

In accord with original. See *Doxol Gas of Angier, Inc. v. Barefoot*, 10 N.C. App. 703, 179 S.E.2d 890 (1971); *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 180 S.E.2d 407 (1971).

**Stated in Hill v. Hill**, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

**Cited in Whaley v. Rhodes**, 10 N.C. App. 109, 177 S.E.2d 735 (1970).

## II. THE RELIEF.

### Modification by One Judge, etc.—

A superior court judge did have authority, upon motion under this rule, to set aside an order entered in another superior court where that order was entered without power and authority and was a nullity. *Charleston Capital Corp. v. Love Valley*

*Enterprises, Inc.*, 10 N.C. App. 519, 179 S.E.2d 190 (1971).

If a judge of a superior court enters an order without legal power to act in respect to the matter, such order is a nullity, and another superior court judge may disregard it without offending the rule which precludes one superior court judge from reviewing the decision of another. *Charleston Capital Corp. v. Love Valley Enterprises, Inc.*, 10 N.C. App. 519, 179 S.E.2d 190 (1971).

## III. APPLICATION OF THE PRINCIPLES.

### A. Neglect of Party.

#### For the personal inattention, etc.—

While inattention and neglect of a person are attributed to the similarity in the title of a case to a former action, and to his preoccupation in the duties of his profession, this should not be held in law to constitute such excusable neglect as would relieve an intelligent and active businessman from the consequences of his inattention, as against diligent suitors. *Rawleigh, Moses & Co. v. Capital City Furniture, Inc.*, 9 N.C. App. 640, 177 S.E.2d 332 (1970).

#### Party under Physical and Mental Strain.

—An affidavit stating that as a result of certain duties an affiant was under tremendous physical and mental strain at the time he was served with a summons and complaint and for several weeks thereafter, is insufficient to support an order setting aside a default judgment on the ground of excusable neglect. *Rawleigh, Moses & Co. v. Capital City Furniture, Inc.*, 9 N.C. App. 640, 177 S.E.2d 332 (1970).

### B. Neglect of Counsel.

#### Where Negligence, etc.—

The neglect of the attorney will not be imputed to the litigant unless he is guilty of inexcusable neglect. *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 180 S.E.2d 407 (1971).

## IV. PLEADING AND PRACTICE.

**Motions under section (b) must be made within a reasonable time.** *Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E.2d 446 (1971).

**Where Movant Is Uncertain Whether to Proceed under Clause (1) or (6) of Section (b).**—When the motion is based on reason (1) of section (b) the rule requires it to be made not later than one year after the judgment is taken or entered. If movant is uncertain whether to proceed under clause (1) or (6) of section (b) he need not specify if his motion is timely and the reason justifies relief. *Brady v. Town of*



Chapel Hill, 277 N.C. 720, 178 S.E.2d 446 (1971).

**Power of Court under Clause (6) of Section (b).**—The broad language of clause (6) gives the court ample power to vacate judgments whenever such action is appropriate to accomplish justice. *Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E.2d 446 (1971).

**Written Motion to Set Aside Default Judgment Not Heard Ex Parte.**—Defendant's written motion to set aside a default judgment is not one which might be heard ex parte. *Doxol Gas of Angier, Inc. v. Barefoot*, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

**Findings of Trial Court Conclusive.**—

The facts found by the judge are conclu-

sive if there is any evidence on which to base such finding of fact. *Doxol Gas of Angier, Inc. v. Barefoot*, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

Findings of fact made by the trial court upon a motion to set aside a judgment by default are binding on appeal if supported by any competent evidence. *Kirby v. Asheville Contracting Co.*, 11 N.C. App. 128, 180 S.E.2d 407 (1971).

**But Whether Facts Constitute Excusable Neglect Is Reviewable.**—Whether the facts found constitute excusable neglect or not is a matter of law and reviewable upon appeal. *Doxol Gas of Angier, Inc. v. Barefoot*, 10 N.C. App. 703, 179 S.E.2d 890 (1971).

## Rule 62. Stay of proceedings to enforce a judgment.

**Inapplicability to Summary Ejectment Pursuant to § 7A-232.**—See opinion of Attorney General to Mr. Alton J. Knight, Clerk of Superior Court, Durham County, 1/30/70.

**Inapplicability for Issuance of Execution.**—See opinion of Attorney General to Mr. James R. Sugg, 41 N.C.A.G. 368 (1971).

**Cited in Hill v. Hill**, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

## ARTICLE 8.

### *Miscellaneous.*

## Rule 65. Injunctions.

**Rule 3 and section (b) of this rule must be construed in pari materia;** procedure under section (b) of this rule is permissible only after an action is commenced as provided by Rule 3. *Carolina Freight Carriers Corp. v. Local Union #61*, 11 N.C. App. 159, 180 S.E.2d 461 (1971).

**A "temporary restraining order" and a "preliminary injunction" serve the same function.** *Lambe v. Smith*, 11 N.C. App. 580, 181 S.E.2d 783 (1971).

**A preliminary or interlocutory injunction can only be issued after notice and a hearing, which affords the adverse party an opportunity to present evidence in his behalf, and usually is not for a fixed, limited period of time, since ordinarily its purpose is to preserve the status quo until the issues are adjudged after a final hearing.** *Lambe v.*

*Smith*, 11 N.C. App. 580, 181 S.E.2d 783 (1971).

**The ex parte restraining order is subject to definite time limitations, and is to preserve the status quo until the motion for a preliminary injunction can, after notice, be brought on for hearing and decision.** *Lambe v. Smith*, 11 N.C. App. 580, 181 S.E.2d 783 (1971).

**The decision of the trial judge to grant or deny a preliminary injunction rests in his sound judgment and discretion.** *Lambe v. Smith*, 11 N.C. App. 580, 181 S.E.2d 783 (1971).

**Applied in Town of Hillsborough v. Smith**, 10 N.C. App. 70, 178 S.E.2d 18 (1970); *Register v. Griffin*, 10 N.C. App. 191, 178 S.E.2d 95 (1970).

## Rule 70. Judgment for specific acts; vesting title.

**Cited in Hill v. Hill**, 11 N.C. App. 1, 180 S.E.2d 424 (1971).

## Rule 84. Forms.

**Language Describing Forms Is Identical to That of Federal Rule.**—This rule declares that Forms 3 and 4 and all the other forms of complaint incorporated therein are "sufficient under these rules and are in-

tended to indicate the simplicity and brevity of statement which the rules contemplate." This language is identical to that of federal Rule 84. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970).

## Chapter 1B.

### Contribution.

#### ARTICLE 1.

#### *Uniform Contribution among Tort-Feasors Act.*

##### § 1B-1. Right to contribution.

**Article Applies to Liability for Injury or Wrongful Death.**—The Uniform Contribution among Tort-Feasors Act specifically refers to liability for injury or wrongful death. *Simmons v. Wilder*, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

**Settlements Are Encouraged.**—The Uniform Contribution among Tort-Feasors Act contemplates that settlements are to be

encouraged. *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

**Effect of Release or Covenant Not to Sue.**—The provisions of this section provide for contribution under certain circumstances, but § 1B-4 takes away this right of contribution when the provisions thereof are complied with. *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

##### § 1B-4. Release or covenant not to sue.

**This Section Takes Away Right of Contribution.**—The provisions of § 1B-1 provide for contribution under certain circumstances, but this section takes away this right of contribution when the provisions thereof are complied with. *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

**Settlement between Injured Party and Tort-Feasor Is Insufficient to Show Lack of Good Faith.**—The mere showing that there has been a settlement between an injured party and a tort-feasor is insufficient to show that there has been a lack of good faith in the settlement. The burden of showing a lack of good faith is upon

the party asserting it. *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

**Claim against One Tort-Feasor Reduced by Amount of Settlement.**—Where a passenger injured in an automobile accident settled with one tort-feasor for \$3,750, the other tort-feasor, who went to trial, was entitled to have judgment of \$10,000 rendered against him reduced by \$3,750, but he was not entitled to have judgment reduced to \$3,750. *Wheeler v. Denton*, 9 N.C. App. 167, 175 S.E.2d 769 (1970).

**Applied in** *Simmons v. Wilder*, 6 N.C. App. 179, 169 S.E.2d 480 (1969).

#### ARTICLE 2.

#### *Judgment against Joint Obligors or Joint Tort-Feasors.*

##### § 1B-7. Payment of judgment by one of several.

**Satisfaction of Judgment by Joint Tort-Feasor May Not Satisfy Judgment for Other Tort-Feasor for Driver License Sus-**

**pension Purposes.**—See opinion of Attorney General to Mr. Freeman, Department of Motor Vehicles, 8/12/70.

## STATE OF NORTH CAROLINA

### DEPARTMENT OF JUSTICE

Raleigh, North Carolina

November 1, 1971

I, Robert Morgan, Attorney General of North Carolina, do hereby certify that the foregoing 1971 Cumulative Supplement to the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

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*Attorney General of North Carolina*









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